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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DONALD SHEPARD,

Petitioner,

v.

JOANN CAVALIERI, as plenary guardian of the Estate of STEVEN CAVALIERI, a disabled person,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Fourteenth Amendment imposes an ongoing duty upon a police officer, who has surrendered custody of a suspect to jail officials in a different police agency, to warn such officials when the officer subsequently hears allegations by lay persons that the suspect may be suicidal?

II. If such a duty exists, whether that duty was clearly established in the law in June 1998.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
TABLE OF APPENDICES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	1
REASONS FOR GRANTING THE PETITION	7
I. A non-custodial officer does not owe an on-going constitutional duty to a pre-trial detainee to keep the jail authorities informed of information the officer learns, after custody has been transferred, about the detainees' mental condition.	8
II. The right of the pre-trial detainee to the warning required by the Seventh Circuit and the duty of the officer to give such a warning were not clearly established in the law.	10
CONCLUSION	16

TABLE OF CITED AUTHORITIES

Page

Cases:

Anderson v. Romero, 72 F.3d 518 (7th Cir. 1995) .. 12

Bell v. Wolfish, 441 U.S. 520, 60 L. Ed. 2d 447, 99 S. Ct. 1861 (1979) 8-9

Collignon v. Milwaukee County, 163 F.3d 982 (7th Cir. 1998) 9, 11, 12, 13

DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189, 103 L. Ed. 2d 249, 109 S. Ct. 998 (1989) 9

Egebergh v. Nicholson, 272 F.3d 925 (7th Cir. 2001) 11

Estate of Novack v. County of Wood, 226 F.3d 525 (7th Cir. 2000) 13

Estelle v. Gamble, 429 U.S. 97, 50 L. Ed. 2d 251, 97 S. Ct. 285 (1976) 8, 9

Farmer v. Brennan, 511 U.S. 825, 128 L. Ed. 2d 811, 114 S. Ct. 1970 (1994) 8, 13, 15

Gutierrez v. Peters, 111 F.3d 1364 (7th Cir. 1997) .. 13

Hope v. Pelzer, 536 U.S. 730, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002) 7, 8, 10, 11, 12, 15

Cited Authorities

	Page
Hudson v. McHugh, 148 F.3d 859 (7th Cir. 1998)	15
Laaman v. Helgemoe, 437 F. Supp. 269 (D.N.H. 1977)	13
Moy v. County of Cook, 159 Ill. 2d 519, 640 N.E.2d 926 (1994)	1-2, 9
Payne v. Churchich, 161 F.3d 1030 (7th Cir. 1998)	9
Saucier v. Katz, 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001)	7, 8, 10, 12, 15
Tesch v. County of Green Lake, 157 F.3d 465 (7th Cir. 1998)	9
Viero v. Bufano, 901 F. Supp. 1387 (N.D. Ill. 1995)	11, 12
United States Constitution:	
Eighth Amendment	8
Fourteenth Amendment	i, 1, 2, 10, 15
Statute:	
42 U.S.C. § 1983	1

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Seventh Circuit Decided February 24, 2003 ..... 1a

Appendix B — Order Of The United States District Court For The Central District Of Illinois, Danville/ Urbana Division Dated And Filed October 15, 2001 ..... 22a

Appendix C — Order Of The United States Court Of Appeals For The Seventh Circuit Denying Petition For Rehearing Dated March 20, 2003 ..... 55a

OPINIONS BELOW

The opinion of the United States Court of Appeals (App. 1a) is reported at 321 F.3d 616. Its denial of the petition for rehearing is reproduced in the appendix (App. 55a). The decision and judgment of the district court are unreported and are reproduced in the appendix (App. 22a).

JURISDICTION

The court of appeals entered its judgment on February 24, 2003 (App. 1a). The timely-filed petition for rehearing with suggestions for rehearing *en banc* was denied on March 20, 2003 (App. 55a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution is identified as the source of the right claimed and the cause is brought under 42 U.S.C. § 1983.

STATEMENT OF THE CASE

Issues presented to the trial and appellate courts.

This case was brought under 42 U.S.C. § 1983 and related state law claims. Plaintiff is the mother of Steven Cavalieri, who is in a persistent vegetative state since his attempted suicide in the Champaign County, Illinois, jail on June 4, 1998. Plaintiff sued the County sheriff, who has exclusive authority over the conditions of confinement of the inmates of the county jail (*See Moy v. County of Cook*, 159 Ill. 2d 519,

640 N.E.2d 926 (1994)) and several correctional officers. The County defendants settled and were dismissed. (Order of the district court on summary judgment, App. 53a) The plaintiff also sued the City of Champaign and fourteen of its police officers who were involved in the arrest of Steven Cavalieri and the investigation of the crimes he allegedly committed. All of the City defendants were granted summary judgment except Detective Donald Shepard, whose claim of qualified immunity was denied. Shepard and the City, on a *respondeat superior* basis, were also denied summary judgment on one of the related state law claims. That claim is still before the district court. (Order of the district court on summary judgment, App. 53a-54a.)

The key issue is whether Shepard owed a duty to warn the Champaign County jail authorities of the information that Shepard learned after custody of Cavalieri had been transferred from the City police to the County jail, about Cavalieri's potential suicidal state. Shepard argued that the Fourteenth Amendment duty to provide necessary medical and mental health care for pretrial detainees is one that belongs to the custodial agency or to custodial officers and is not owed by a police officer who does not have custody. Shepard further argued that although he did not inform the County jail authorities that Cavalieri's mother said he was suicidal and that his kidnapping victim said that he had threatened to kill himself, his actions were not deliberately indifferent to a substantial risk of suicide as a matter of law. Shepard did take some action. He called Cavalieri at the jail to check on him; he told him his mother would soon be there to see him, after she arranged for a counselor to talk to him; and, he then led Mrs. Cavalieri to the County Mental Health offices.

The Seventh Circuit Court of Appeals disagreed with Shepard and affirmed the trial court. But in so doing it did not cite a single case holding that a police officer owes a duty to a pretrial detainee who is not in his custody. Indeed, defendant has not found any case that has imposed upon a non-custodial police officer a duty to provide medical or mental health or warnings to the custodial agency that such care might be needed. The plaintiff has not cited such a case and the trial court did not find such a case. Yet, the defense of qualified immunity was rejected.

The Seventh Circuit avoided the issue of the duty of a non-custodial officer by simply holding that the right of Steven Cavalieri "to be free of deliberate indifference to suicide" was clearly established. The court downplays the fact that Shepard did not have custody by stating, "The fact that several state agencies were working together on his case, and that Steven happened to attempt suicide in the county's facility rather than at the police station, does not change this analysis." But every case that has imposed a constitutional duty to a pretrial detainee has imposed it upon a custodial officer.

Summary of relevant facts.

The following facts, before the trial court on summary judgment, are limited here to the information that Shepard learned as he became involved in the case.

Officer Donald Shepard, a detective in the City of Champaign Police Department, reported for his normal shift at approximately 8:00 a.m. on June 4, 1998. He was assigned to interview Steven Cavalieri, who had been arrested shortly before at an apartment where he had held his ex-girlfriend

hostage. That situation had been successfully resolved, without injury, by the Champaign Police Department's SWAT team after a standoff of several hours. Shepard was told to interview Cavalieri because Cavalieri might know something about a weapon that had not been found at the scene. Shepard interviewed Cavalieri, beginning at about 8:45 a.m. Cavalieri denied knowing anything about a gun and denied having done anything wrong. Shepard learned very little about why Cavalieri had been arrested. Cavalieri seemed guarded in his answers to the questions Shepard asked him, but otherwise Shepard said he was calm and cooperative. However, he did tell Shepard that he had been arrested on a prior occasion and that when he was in jail he had been able to "talk to someone" and he asked Shepard if he would be able to do that this time. Shepard understood Cavalieri to be asking whether he could see a counselor at the County jail. Shepard told him that he should tell the jail personnel at intake that he wanted to see a counselor. The interview ended shortly before 10:00 a.m. and Cavalieri was then transported to the County jail where custody was transferred to the County Sheriff.

Shepard was assigned as part of the investigation team and following the end of his interview with Cavalieri, he joined an interview in progress, at a few minutes after 10:00 a.m., with Cavalieri's hostage, Stephanie Rouse. Rouse was telling Detective Strezesak about the events of the night before when Shepard joined the interview. She told the officers that about a month earlier Cavalieri, her ex-boyfriend, had broken into her apartment. He was arrested and he was ordered to stay away from her. Nonetheless, he had driven down from Chicago to see her and she agreed to talk to him. In the early morning hours of June 4, 1998, he drove her out into a rural area and then threatened to kill her and himself. He showed her a pistol and a knife. She was frightened but

was able to calm him down. They drove back to Champaign and went to a restaurant. There, Cavalieri told her he got rid of the gun and apologized to her. They called Cavalieri's mother, who lived in the Chicago area, from a pay phone at the restaurant. Mrs. Cavalieri called the Crisis Hotline in Champaign County. Cavalieri and Rouse left the restaurant and went to a friend's apartment where they also placed a call to the Crisis Hotline. She described the contact with the SWAT team and leaving the apartment.

Cavalieri's mother drove down from Chicago arrived at the Champaign Police Department between 10:45 and 11:00 a.m. Detective Shepard and some other officers interviewed her. Mrs. Cavalieri told Shepard she wanted to make arrangements to get a counselor to see her son because he had seen a counselor the previous time he was arrested. She testified that she told Shepard about her son's mental condition, the calls to the Crisis Line, that he had been on suicide watch when he was arrested in May, and that he needed to be on suicide watch and not be alone. According to her, Shepard promised that Cavalieri would not be alone; she said that Shepard told her that her son was "on overload."

While Mrs. Cavalieri was still with him, Shepard called the jail and talked to Cavalieri. Shepard testified that he told Cavalieri that his mother was in Champaign and would come to see him after she made arrangements to have a counselor see him. Cavalieri said he was okay and was looking forward to seeing his mother. At approximately 11:30 a.m., Mrs. Cavalieri followed Shepard to the Champaign County Mental Health Center so that she could talk to counselors about her son.

At approximately 2:10 p.m., Cavalieri was found in the holding cell, unconscious, hanging from the telephone cord. He has not regained consciousness since that time and he remains essentially in an unresponsive state and resides in a nursing home near his mother's residence.

Plaintiff did not offer any expert testimony of Cavalieri's mental state at any time. There is no expert testimony that Cavalieri exhibited symptoms of suicidal tendency or that he was in fact suicidal at any time before he was found hanging in the jail cell. There is no expert testimony to explain the significance of the threats he made to his ex-girlfriend. There was no evidence offered to support Mrs. Cavalieri's claim that her son was suicidal. There is no expert testimony that a lay person would have recognized that Cavalieri was suicidal or that even a mental health professional would have recognized this.

In his deposition, Shepard testified that following his interview of Cavalieri and Rouse and after speaking to Cavalieri's mother, he did not believe Cavalieri was a suicide risk. Shepard said his belief was based upon the following facts and observations: although Rouse had said that Cavalieri had threatened to kill her and himself, she also said he later told her he would not hurt her and apologized to her; Cavalieri was calm when Shepard interviewed him, Cavalieri was already under arrest and had no weapon; he was in custody and in a safe place; and, when Shepard talked to him on the telephone at the jail, he said he was fine and indicated he wanted to see his mother.

REASONS FOR GRANTING THE PETITION

The Court should grant this Petition because the appellate court improperly applied this Court's decisions in *Hope v. Pelzer*, 536 U.S. 730, 122 S. Ct. 2508, 2516, 153 L. Ed. 2d 666 (2002) and *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001) greatly diminishing the protections of qualified immunity. In holding that Shepard had a constitutional duty to warn a the jail of the facts he learned after custody had been transferred, the Court announced such a duty for the first time but still denied Shepard the protections of qualified immunity. It is Petitioner's position that on both prongs of the test of qualified immunity (no such duty was owed and no such duty was clearly established in the law when Shepard acted) the appellate court erred.

The opinion of the Seventh Circuit creates a new class of duties which law enforcement officers now owe to persons held in custody by another agency. Under the rule now in place in the Seventh Circuit, a law enforcement officer has a continuing duty to keep jail officials apprised of information developed during the course of a criminal investigation if that information suggests that a detainee might be suicidal. The Seventh Circuit does not limit that duty to officers involved in the case; rather, any state actor who has information that might bear upon the mental health of one in custody would have to be reported. The court did not describe the kinds of information that must be reported to the jail authorities, the length of time the duty might last, to whom the report must be made, or whether the reporting officer must somehow follow up his report. The opinion does not indicate what, if anything, the jail authorities must do with the information. Further, although prior case law suggests

that even custodial officers must act only upon information indicating a substantial and imminent risk of suicide, this decision suggests a dramatic expansion of the duty because, here, there was no evidence that the risk was substantial or imminent.

The Seventh Circuit was wrong. It has greatly diminished the protections of qualified immunity. Even while citing and ostensibly following this Court's decisions in *Saucier* and *Hope*, it has created a new constitutional duty, it has departed from well-settled law, it has created an unjustified burden on law enforcement and it has significantly diminished the proof required to show deliberate indifference.

I. A non-custodial officer does not owe an on-going constitutional duty to a pre-trial detainee to keep the jail authorities informed of information the officer learns, after custody has been transferred, about the detainees' mental condition.

When one is involuntarily confined in a jail he is unable to provide for himself the basic necessities of life. This Court has determined that the prisoner has certain constitutional rights to basic necessities. Those who confine him, if he is convicted and serving a sentence, owe the prisoner correlative constitutional duties under the Eighth Amendment to provide him with, for instance, necessary medical care. (*E.g. Estelle v. Gamble*, 429 U.S. 97, 103, 50 L. Ed. 2d 251, 97 S. Ct. 285 (1976); *see also Farmer v. Brennan*, 511 U.S. 825, 833, 128 L. Ed. 2d 811, 114 S. Ct. 1970 (1994).) A similar analysis has been applied to the pre-trial detainee, although the Fourteenth Amendment rather than the Eighth Amendment has been found to be the source of the right. *Bell v. Wolfish*, 441 U.S. 520, 535 n.16, 60 L. Ed. 2d 447, 99 S. Ct. 1861

(1979); *Payne v. Churchich*, 161 F.3d 1030, 1039-41 (7th Cir. 1998); *Tesch v. County of Green Lake*, 157 F.3d 465, 473 (7th Cir. 1998).

In all of these cases, the right of the person in custody is held against the custodial officers or agency. In no case that petitioner has found, in no case cited by the plaintiff here, and in no case cited by the district court or the appellate court below, has a person in custody been found to hold such a right against an officer who does not have custody of him. Indeed, both This Court and the Seventh Circuit have noted it is because of the custody that a right is held and a duty is owed but where there is no custody there can be no due process violation. (*Estelle v. Gamble*, 429 U.S. 97, 50 L. Ed. 2d 251, 97 S. Ct. 285 (1976); *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 198-201, 103 L. Ed. 2d 249, 109 S. Ct. 998 (1989) and *Collignon v. Milwaukee County*, 163 F.3d 982, 987 (7th Cir. 1998) (rejecting claimed due process rights and duties to protect those who are not in custody).) Those who have custody have the ability to observe the person detained and to act upon his needs. In this situation, Shepard could not provide mental health treatment. He could not take Cavalieri to a doctor. The Sheriff has sole and exclusive authority over the inmates of the County jail. *Moy v. County of Cook*, 159 Ill. 2d 519, 640 N.E.2d 926 (1994).

The Seventh Circuit found that Cavalieri had a constitutional right to be "free from deliberate indifference to suicide." (321 F.3d at 623) While as a general proposition that constitutional right may exist, in this case that is not enough to resolve the first prong of the qualified immunity analysis. The question is, upon whom does the correlative duty to protect that right fall? Unlike most cases where the

identification of the constitutional right also identifies who owes the correlative constitutional duty, it is not as clear in this case. In this case, the plaintiff and the Seventh Circuit seek to place the duty upon one who does not have custody and one who does not have authority to act to relieve the risk.

All of the cases place the duty upon the custodians. None have placed a duty upon non-custodians until the Seventh Circuit did here when it announced the duty to warn. There does not appear to be any basis for finding such a duty in the due process clause of the Fourteenth Amendment.

II. The right of the pre-trial detainee to the warning required by the Seventh Circuit and the duty of the officer to give such a warning were not clearly established in the law.

Saucier v. Katz, 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001), and *Hope v. Pelzer*, 536 U.S. 730, 122 S. Ct. 2508, 2516, 153 L. Ed. 2d 666 (2002), both noted that qualified immunity "operates 'to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful.'" (*Hope*, 536 U.S. at 739 quoting *Saucier*, 533 U.S. at 206.) While there need not be a case which has specifically held that the very act in question is unlawful, still the law must be clear enough that an officer has the same fair notice that a criminal defendant has the his actions are unlawful. (*Hope*, 536 U.S. at 740, 121 S. Ct. at 2515, 153 L. Ed. 2d at 678.) In *Saucier*, the Court cautioned that the inquiry into whether the constitutional right was clearly established must be undertaken in light of the specific circumstances facing the officer, and not as a general proposition, so that he would have notice that his conduct was unlawful under those circumstances. *Saucier*, 533 U.S. at 202, 121 S. Ct at 2156, 150 L. Ed. 2d at 82.

Despite that admonition, however, the appellate court below described the right claimed by plaintiff in very broad terms: ". . . the right Mrs. Cavalieri asserts on behalf of Steven is the right to be free from deliberate indifference to suicide. There is no doubt that this right was clearly established prior to Steven's 1998 suicide attempt. *See Hall v. Ryan*, 957 F.2d 402, 406 (7th Cir. 1992)." (321 F.3d at 623) *Citing Hope v. Pelzer*, 536 U.S. 730, 122 S. Ct. 2508, 2516, 153 L. Ed. 2d 666 (2002), the court found the law which existed at the time gave Shepard fair notice that his failure to notify the County jail that he had learned facts suggesting that Cavalieri was a suicide risk was unlawful and unconstitutional. 321 F.3d at 623-24.

The appellate court cited no prior cases which held that an officer owes a duty to a prisoner or a detainee who is not in his custody to keep the custodial agency advised of information the officer learned about the prisoner after custody was transferred. Of the three cases it discussed in the context of the argument, *Egebergh v. Nicholson*, 272 F.3d 925, 927-28 (7th Cir. 2001), *Collignon v. Milwaukee County*, 163 F.3d 982 (7th Cir. 1998) and *Viero v. Bufano*, 901 F. Supp. 1387, 1394 (N.D. Ill. 1995), none so held. In *Egebergh*, custodial police officers failed to allow the prisoner his shot of insulin, knowing he needed it. His death was attributable to their failure, while he was in their custody, to provide him with the insulin. (272 F.3d at 927-28.) In *Collignon*, plaintiffs claimed that the previous custodial officers violated their son's substantive due process rights by releasing him on bond with knowledge of his mental problems. The Seventh Circuit rejected the argument that the defendants had a duty to protect after the release on bond stating, ". . . whatever liability might attach to the County defendants must be based on actions or inactions taken while Jonathan was in custody" and specifically noted that the constitutional duty to provide health care flows

directly from the fact of custody. (*Collignon*, 163 F.3d at 987.) Finally, in *Viero*,[1] a trial court, addressing the defense of qualified immunity on a motion to dismiss, held that a juvenile's probation officer had a duty to provide to the detention center information concerning medication he was on and some of his history, information the probation officer had prior to his incarceration. In that case it was also alleged that the probation officer had refused to deliver the juvenile's medication to the jail authorities. *Viero,* 901 F. Supp. at 1394-95.

In this case, however, the Seventh Circuit Court of Appeals has framed the constitutional right in the most general of terms and applied *Hope* and *Saucier* in such a manner that Shepard had no notice at all that he had a constitutional duty to Cavalieri[2] to keep the County jail advised of information developed during the investigation of the crimes for which Cavalieri was arrested

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1. Not only is this case not on point, but because it is a district court opinion it is not controlling authority for the purpose of finding clearly established law. *Anderson v. Romero*, 72 F.3d 518, 525 (7th Cir. 1995).

2. In a hypothetical discussion, the appellate court suggests that if Shepard had information that Cavalieri was violent or was armed, Shepard may have had a duty to other prisoners or other correctional officers to warn them of those facts. (321 F.3d at 623.) Whether such a common law duty to others would lie in a tort case does not seem relevant to the existence of a constitutional duty owed to Cavalieri. The court also refers to the correctional officers at the jail as "colleagues" of Shepard, although they do not work for the same agency. This reference suggests that the court views the difference in agencies as insignificant and implies that all law enforcement officers regardless of the agency they work for have a duty to share information regarding physical or mental health of prisoners. The court cites no cases, however, that require the sharing of information between agencies.

and that he was acting unlawfully in failing to inform the jail authorities. The only cases cited by the court impose a duty only upon custodial officers. Had Shepard read all of the cited cases, he would not have discovered that he had a duty to warn.

A custodial officer has a duty to act in a way that is not deliberately indifferent to the risk perceived. (*See Farmer v. Brennan*, 511 U.S. 825, 837, 128 L. Ed. 2d 811, 114 S. Ct. 1970 (1994).) Where the risk at issue is one of suicide, the duty to protect or to provide medical or mental health services is imposed where the need is substantial and the risk is imminent. (*Estate of Novack v. County of Wood*, 226 F.3d 525, 529 (7th Cir. 2000) ("In order to be liable under the Eighth Amendment, a prison official must be cognizant of the significant likelihood that an inmate may imminently seek to take his own life and must fail to take reasonable steps to prevent the inmate from performing this act."); *Collignon*, 163 F.3d at 990 ("Placing a pre-trial detainee on some level of suicide watch, even the highest level, does not demonstrate a subjective awareness of a substantial risk of imminent suicide.").) The risk, in the absence of a doctor's diagnosis, must be objectively serious. An objectively serious risk is one "so obvious that even a lay person would easily recognize the necessity for a doctor's attention." (*See Gutierrez v. Peters*, 111 F.3d 1364, 1373 (7th Cir. 1997), quoting with approval, *Laaman v. Helgemoe*, 437 F. Supp. 269, 311 (D.N.H. 1977).) It is a difficult burden to show what a layman should recognize. As quoted above, the Seventh Circuit recently held, in a case where the inmate had been treated a psychiatrist, even knowledge of mental problems and that a detainee was on a high level of suicide watch was held not to be sufficient to show this immanency of risk. *Collignon*, 163 F.3d at 990.

There was no expert testimony offered by the plaintiff here; there was no mental health assessment or diagnosis. Only an unsupported statement of Mrs. Cavalieri, who had not yet seen her son and who had only information by telephone in the early morning hours during the kidnapping, and the allegation of Rouse that Cavalieri had threatened to take his own life after killing her, a threat he did not carry out, were available to Shepard to support an inference that suicide was even a remote possibility. But Shepard had no evidence from which knowledge of an *imminent* or even a substantial risk of suicide could be inferred. At the time Cavalieri threatened to kill himself, he was also threatening to kill his hostage. That situation was resolved. Cavalieri had not carried out his threat when he did have weapons. Now, Cavalieri was unarmed and in the custody of the jail. No mental health expert, no doctor, had made any diagnosis or even suggestion that Cavalieri was suicidal. The statements of Mrs. Cavalieri contradicted Shepard's own observations and his knowledge from Cavalieri himself during the interview and the telephone conversation. There was no evidence obvious to a layman that the risk of suicide was significant, likely or imminent.

Finally, it is important to understand just how low a bar the Seventh Circuit has set for proof of deliberate indifference. As the dissenting opinion below pointed out, if Shepard had any duty to Cavalieri it was a duty to act in a way that was not deliberately indifferent. Shepard did not ignore the mental stress that Cavalieri was under. Shepard did take action on the risk he perceived. In his initial interview, Shepard told Cavalieri that he could see a mental health counselor at the jail by asking the intake officer. He advised Mrs. Cavalieri to go to County Mental Health to make arrangements for a counselor. He called Cavalieri at the jail, checked his welfare and told him his mother would be seeing him after she talked to county mental health. Nonetheless, the

Seventh Circuit has suggested that the jury might find that his failure to make the telephone call to the jail, warning them of this information, was deliberate indifference.

These actions do not meet the standard of deliberate indifference, actions akin to intentional conduct, to criminal recklessness, ignoring a known risk, set out in *Farmer v. Brennan*, 511 U.S. 825, 837, 128 L. Ed. 2d 811, 114 S. Ct. 1970 (1994). (*See also Hudson v. McHugh*, 148 F.3d 859, 863 (7th Cir. 1998) (deliberate indifference is equated to "inaction or woefully inadequate action.")) If Shepard should also have called the jail to tell them of mother's concern and the statements of the hostage, it can be no more than negligence. A jury should not be allowed to decide, as did the panel, that because a telephone call was easy to make Shepard's failure to make it was deliberately indifferent.

For each of these reasons – that no court had held a non-custodial officer owed a duty to warn; that there was no evidence that the risk of suicide was substantial and imminent; and that the existing law indicated that only no action or woefully inadequate action could constitute deliberate indifference – the appellate court erred in finding that Shepard's duty was clearly established and that he should have known that his failure to call the jail was unlawful.

This Court should grant the writ of certiorari to correct the fundamental errors of the appellate court in applying the decisions in *Saucier* and *Hope* to the qualified immunity defense raised in this case and to review the holding that non-custodial police officers owe a Fourteenth Amendment duty to persons not in their custody.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED FEBRUARY 24, 2003

In the
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 01-3745

JOANN CAVALIERI, AS PLENARY GUARDIAN OF THE ESTATE OF STEVEN CAVALIERI, A DISABLED PERSON,

Plaintiff-Appellee,

v.

DONALD SHEPARD,

Defendant-Appellant.

Appeal from the United States District Court
for the Central District of Illinois.
No. 99-CV-2121—**Michael P. McCuskey**, *Judge.*

ARGUED MAY 24, 2002—DECIDED FEBRUARY 24, 2003

Before POSNER, MANION, and DIANE P. WOOD, *Circuit Judges.*

DIANE P. WOOD, *Circuit Judges.* Steven Cavalieri is in a vegetative state after attempting suicide in a holding cell in the Champaign County Correctional Facility (the CCCF). Steven's mother, Joann Cavalieri, brought this action under 42 U.S.C. § 1983 as the guardian of her son's estate, claiming

that Steven attempted suicide after Donald Shepard, a police officer with the City of Champaign (the City), and others acted with deliberate indifference to his risk of suicide. Shepard now appeals from the district court's denial of his motion for summary judgment and claim of qualified immunity. We affirm.

I

Although this is an interlocutory appeal, Shepard is entitled to bring it now, because he is raising the question whether he should have prevailed on his defense of qualified immunity, based on the facts taken in the light most favorable to Mrs. Cavalieri. See *Mitchell v. Forsyth*, 472 U.S. 511, 525-26 (1985). We must resolve a qualified immunity issue as early as possible in the proceedings, because it is an "*immunity from suit* rather than a mere defense to liability." *Saucier v. Katz*, 533 U.S. 194, 200 (2001) (emphasis in original). We present the facts below in the light most favorable to Mrs. Cavalieri, because we have no appellate jurisdiction to the extent disputed facts are central to the case. See *Johnson v. Jones*, 515 U.S. 304 (1995).

On June 4, 1998, Steven kidnaped Stephanie Rouse, his former girlfriend, and took her from Champaign to a remote area of Urbana. Using a gun, he threatened to kill both Rouse and himself. Rouse convinced Steven to drive back to town, and then she called his mother from a public phone. After speaking with Rouse, Mrs. Cavalieri called the Crisis Hotline in Champaign County. Rouse later placed a call to the Crisis Hotline as well. The Crisis Hotline contacted the Metropolitan Computer Aided Dispatch (METCAD), which called the City Police Department.

Appendix A

The Champaign Police Department dispatched two officers who were instructed that there was a hostage situation involving a man with a gun. At approximately 3:00 a.m., the officers knocked on Rouse's door; a male responded, but he refused to let the officers inside. The officers then called a hostage negotiation team and contacted Rouse by telephone. Rouse denied that Steven was present and that she might need assistance, but she also refused to leave her apartment. This standoff continued for several hours until approximately 6:00 a.m., when a member of the hostage negotiation team spoke with Mrs. Cavalieri. She advised the officers that her son was suicidal and needed to go to a hospital.

About an hour later, the SWAT team entered the apartment using pepper spray. They immediately handcuffed and removed all the occupants, including Steven, who was found hiding under a kitchen cabinet. Rouse was briefly interviewed at the scene. After the SWAT team located Steven, Rouse informed the officers of the events of the evening, specifically telling them that Steven had threatened to kill both himself and her.

After Steven arrived at the City jail, he met with defendant Shepard for approximately one hour. Steven asked Shepard if he could speak to a mental health counselor, and Shepard explained that jail personnel would arrange for him to speak with someone. At around 10:00 a.m., Steven was transferred to the CCCF. Despite the official transfer, Shepard remained personally involved with the case and continued to participate in interviews with both Rouse and Mrs. Cavalieri.

Appendix A

First, Shepard joined an ongoing interview with Rouse. Rouse explained once again that Steven had threatened to kill her and commit suicide himself. Rouse also told Shepard that this kidnaping came just a month after Steven was arrested for criminal trespass at Rouse's apartment. Finally, Rouse told Shepard that Steven claimed that he would kill himself if he ever returned to jail.

Next, Shepard interviewed Mrs. Cavalieri. Mrs. Cavalieri told Shepard that she wanted to make arrangements to ensure that her son saw a counselor. She also explained that her son's mental condition was fragile, and she told Shepard about the calls to the Crisis Line the night before. Finally, she told Shepard that Steven had been on suicide watch the month before at the CCCF, while he was being held there in conjunction with his criminal trespass arrest. Shepard advised Mrs. Cavalieri that Steven's mind was "on overload," that he seemed very upset, and that he believed Steven would need counseling. Mrs. Cavalieri told Shepard that Steven needed to be on suicide watch and should not be left alone. Shepard responded by promising Mrs. Cavalieri that Steven would not be alone.

Around 11:00 a.m., Shepard called the CCCF to speak with Steven. He informed Steven that Mrs. Cavalieri was with him and that she would arrange for him to have a counselor. During this conversation Steven told Shepard that he was doing fine and that he was looking forward to seeing his mother. Shepard then directed Mrs. Cavalieri to County Mental Health so that she could arrange for Steven to speak with a counselor.

Shepard asserts that after completing these interviews, he did not subjectively believe that Steven was a suicide risk. He emphasizes that Steven seemed calm when they spoke on the phone, was without weapons, and that during their phone conversation he stated that he was doing fine. Unfortunately, this was far from the case.

After Steven was transferred to the CCCF, he was not placed on suicide watch. Steven himself did not alert the CCCF staff to the fact that he was having suicidal thoughts. Indeed, during his intake he denied all the events of the early morning (having the gun, harming or threatening anyone, having suicidal thoughts or ever attempting to commit suicide). He did ask to speak to a mental health advisor, and was told he would receive one, but no advisor came before his attempt on his life. Steven was assigned to a holding cell in the booking area while he awaited further processing. The holding cell contained a telephone with a strong metal cord. Later that afternoon, Shepard called the CCCF to instruct the guards to put a stop to Steven's phone calls, as he had been making annoying calls to Rouse. Shepard was then informed that around 2:10 p.m., Steven had been found unconscious, hanging from the wire telephone cord. To this day, he has not regained consciousness and remains in an unresponsive state. He now lives in a nursing home near his mother.

II

As the Supreme Court recently reminded us, in order to decide whether a defendant is entitled to qualified immunity, we must first determine whether (taking the facts in the light

most favorable to the plaintiff) a constitutional right was violated, and second, if those facts would demonstrate a violation, we must decide whether the right in question was clearly established at the time the events took place. *Saucier*, 533 U.S. at 200. We review these issues *de novo*, *DuFour-Dowell v. Cogger*, 152 F.3d 678, 680 (7th Cir. 1998). Viewing the record in the light most favorable to Mrs. Cavalieri, we conclude that Shepard can prevail in this case only if certain disputed facts are resolved in his favor by a trier of fact. Put differently, taking the facts from the required perspective, we conclude that Steven's constitutional rights were violated and that these rights were clearly established as of mid-1998.

A

As an initial matter, we must determine whether Mrs. Cavalieri has alleged facts that would show that Shepard's conduct violated her son's constitutional rights. Mrs. Cavalieri first claimed violations of the Fourth Amendment, but she now correctly asserts that Steven's claim, which she is pursuing as his guardian, arises (if at all) under the Fourteenth Amendment. See *Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979). The Eighth Amendment does not apply to pretrial detainees, but as a pretrial detainee, Steven was entitled to at least the same protection against deliberate indifference to his basic needs as is available to convicted prisoners under the Eighth Amendment. *Id.*; *Payne v. Churchich*, 161 F.3d 1030, 1039-41 (7th Cir. 1998); *Tesch v. County of Green Lake*, 157 F.3d 465, 473 (7th Cir. 1998). Under both the Eighth and Fourteenth Amendment standards, the plaintiff has the burden of showing that (1) the harm to the plaintiff was objectively serious; and (2) that the official

was deliberately indifferent to her health or safety. *Farmer v. Brennan*, 511 U.S. 825, 833 (1994); *Payne*, 161 F.3d at 1041 ("A detainee establishes a § 1983 claim by demonstrating that the defendants were aware of a substantial risk of serious injury to the detainee but nevertheless failed to take appropriate steps to protect him from a known danger.").

The question is whether Shepard was aware that Steven was on the verge of committing suicide (which, if it occurred, surely would qualify as a serious harm). If the trier of fact believes Mrs. Cavalieri's account, the answer is yes. We realize that according to Shepard, the only facts available to him were (1) Rouse's statement that Steven attempted to kill her and himself, but that she had calmed him down and he apologized; (2) that Steven was calm when interviewed; (3) that Steven did not have a weapon and was under custody; and (4) that Steven said he was fine when Shepard spoke with him over the phone. Unfortunately for Shepard, if other evidence in the record is credited, a trier of fact could conclude that he knew much more. Since we must take the facts in the light most favorable to Mrs. Cavalieri, we must also consider four additional facts: (1) that Shepard told Mrs. Cavalieri that Steven was upset during his interview; (2) that Mrs. Cavalieri told Shepard that Steven should be on suicide watch; (3) that Shepard knew that Steven had been on suicide watch only a month before; and (4) that Rouse told Shepard that Steven had warned her that he would kill himself if he was ever returned to the jail.

Shepard argues that the fact that Steven had no weapon with him and was under the CCCF's custody trumps the testimonial evidence of the information he had at his disposal. Unfortunately, these precautions are not always enough to

prevent this kind of event. Although weapons are obviously not permitted in jails and prisons, there are high rates of suicide in prisons (higher than in the general population), and even higher rates among pretrial detainees. See, *e.g.*, *Jutzi-Johnson v. United States*, 263 F.3d 753, 757 (7th Cir. 2001). As a result, prisons and jails have developed procedures for dealing with prisoners who display suicidal tendencies, such as removing items that could be used as a suicide weapon, like sheets or a sturdy telephone cord, or not leaving those prisoners unattended.

Shepard's deposition testimony that he did not think Steven was on the verge of suicide is also not enough to eliminate a genuine issue of fact. We recognize that "strange behavior alone, without indications that that behavior has a substantial likelihood of taking a suicidal turn, is not sufficient to impute subjective knowledge of a high suicide risk to jail personnel." *Estate of Novack ex rel. Turbin v. County of Wood*, 226 F.3d 525, 529 (7th Cir. 2000). Indeed, had no one informed Shepard that Steven was at risk of suicide, this would be a different case. But both Mrs. Cavalieri and Rouse testified that they had alerted Shepard to this specific risk. Shepard was not forced to operate only on the basis of a brief observation, *cf. Mathis v. Fairman*, 120 F.3d 88, 91-92 (7th Cir. 1997) (odd or unusual behavior without more did not place officers on notice that a detainee was at risk for suicide when the officers were unaware of any suicidal tendencies in the detainee). In the present posture of this case, we must take as a given that Shepard was aware that Steven had been arrested for attempting to kill both himself and Rouse, and that he had learned from both women that Steven was at risk for suicide.

Even assuming that Shepard knew about Steven's suicidal inclinations, Mrs. Cavalieri cannot prevail on Steven's claim unless she can also establish that Shepard acted with deliberate indifference to this risk. Deliberate indifference "describes a state of mind more blameworthy than negligence," and "something less than acts or omissions . . . with knowledge that harm will result." *Farmer*, 511 U.S. at 825. Applying a subjective recklessness test, the Court in *Farmer* found that "a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety." *Id.* at 837. The same holds for a pretrial detainee's claim under the Fourteenth Amendment. Although this is a "high hurdle for a plaintiff," *Peate v. McCann*, 294 F.3d 879, 882 (7th Cir. 2002), he "need not show that a prison official acted or failed to act believing that harm actually would befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm." *Farmer*, 511 U.S. at 842.

Shepard insists that he did all that was required of him, and that even on the record taken in the light most favorable to Steven, no reasonable trier of fact could find that he was deliberately indifferent to Steven's suicide risk. He focuses on two specific actions he took: first, his telephone call to Steven to "check on his welfare" and tell him that his mother was coming to see him, and second, his offer to Mrs. Cavalieri to help her arrange for Steven to see a counselor. Of course, Shepard was not required to take perfect action or even reasonable action, even assuming he was aware of the suicide risk; his action must be reckless before § 1983 liability can

be found. *Chapman v. Keltner*, 241 F.3d 842, 845 (7th Cir. 2001). On the other hand, Mrs. Cavalieri is not required to show that Shepard intended that Steven harm himself. *Boncher v. Brown County*, 272 F.3d 484, 487 (7th Cir. 2001). On this record, we conclude that the facts taken most favorably to Mrs. Cavalieri would show that Shepard was deliberately indifferent to Steven's safety. Indeed, if we consider Mrs. Cavalieri's version of events, Shepard may have deliberately misled her. He told her that Steven would not be alone and he also behaved as if he understood the severity of the information she provided him regarding Steven's mental health, yet he did not even take immediate measures that would have been quite easy for him, such as passing her warnings along to the CCCF staff. Perhaps Mrs. Cavalieri would have gone directly to the CCCF if she had known that Shepard did not intend to inform anyone of their conversation. Moreover, Shepard had multiple opportunities to present this information to the CCCF. His two calls to the CCCF demonstrate the ease with which he could have conveyed the information after Steven was transferred. Perhaps a jury would not believe this version, but on this record, a jury could find that Shepard's actions were reckless.

B

Having established that Mrs. Cavalieri has alleged facts that, if proven, show that Shepard violated a constitutional right, we must still address Shepard's argument that he is entitled to qualified immunity because the constitutional right Steven is asserting was not clearly established at the time of these events. *Saucier*, 533 U.S. at 201. Whether a right is

clearly established "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Id.* The right must be clear enough that "a reasonable official would understand that what he is doing violates that right." *Id.* at 202. Although the officer must have knowledge of the right, it is not necessary that a case be "on all fours" with this one for the case to go to a jury. *Montville v. Lewis*, 87 F.3d 900, 902 (7th Cir. 1996). Instead, the question we must ask is whether the law provided Shepard with "fair warning" that his conduct was unconstitutional. *Hope v. Pelzer*, 122 S.Ct. 2508, 2516 (2002) (rejecting the Eleventh Circuit standard that a previous case must be "fundamentally similar" to be clearly established).

Although Shepard and Mrs. Cavalieri differ over how the constitutional right should be characterized, we agree with the district court that at bottom, the right Mrs. Cavalieri asserts on behalf of Steven is the right to be free from deliberate indifference to suicide. There is no doubt that this right was clearly established prior to Steven's 1998 suicide attempt. See *Hall v. Ryan*, 957 F.2d 402, 406 (7th Cir. 1992).

Shepard argues, however, that the present case represents an extension of earlier law because Steven was transferred from the custody of the Champaign Police Department (his employer) to the custody of the CCCF, a county facility. He likens this case to *Collignon v. Milwaukee County*, 163 F.3d 982 (7th Cir. 1998), in which this court found that Milwaukee County was not responsible for the suicide of a pretrial detainee who killed himself after being released to his parents. The most important difference between *Collignon* and this case, however, is that in *Collignon* the detainee left

state custody upon his transfer, and here Steven remained in state custody. Nothing in *Collignon* implies that the court was establishing a general rule of non-liability for transferees. In fact, Shepard's argument implies that he did not have to pass along *any* information to his colleagues in the county jail. No responsible officer in Shepard's position would have taken such a position. If Steven had been armed, Shepard could not have stayed silent and waited to see if the CCCF officials found the weapon; if Steven was prone to violent outbursts, Shepard similarly could not have left his colleagues and the other county detainees at Steven's mercy. While there are different arms of state government, the walls between them are not as high as Shepard implies. To the contrary, each must keep the other informed about material facts, including suicide risks. See *Farmer*, 511 U.S. at 832 (officials required to take adequate measures in response to known risk); see also *Viero v. Bufano*, 901 F. Supp. 1387, 1394 (N.D. Ill. 1995) (adequate measures include communicating likely suicide risk to transferee correctional facility). Even the *Collignon* court conceded that it would have been facing a different problem if the officials had known that the detainee was a likely suicide risk. *Id.* at 990.

Of course, the law did not require Shepard to sit by the telephone all day, communicating with the CCCF about transferred prisoners. The question is what he was supposed to do in the face of the knowledge of a life-threatening situation that he actually had. He made several telephone calls to the CCCF, but he passed by the opportunity to mention that he had been informed that Steven was a suicide risk, and that the jail itself had recognized this only a month earlier. If Shepard had known that a detainee had an illness

that required life-saving medication, he would also have had a duty to inform the CCCF, or any other entity that next held custody over the detainee. See *Egebergh v. Nicholson*, 272 F.3d 925, 927-28 (7th Cir. 2001) (denying a qualified immunity defense where police officers knew that the arrestee was an insulin-dependent diabetic, knew that such people need regular insulin injections, knew that the failure to give injections was potentially fatal, and nonetheless failed to make sure the injections were given, with fatal consequences).

We conclude that the law as it existed at the time of Steven's suicide attempt provided Shepard with fair notice that his conduct was unconstitutional. *Hope*, 122 S.Ct. at 2516. The rule that officials, including police officers, will be "liable under section 1983 for a pre-trial detainee's suicide if they were deliberately indifferent to a substantial suicide risk," *Hall v. Ryan*, 957 F.2d 402, 406 (7th Cir. 1992), was clearly established prior to 1998. The fact that several state agencies were working together on his case, and that Steven happened to attempt suicide in the county's facility rather than at the police station, does not change this analysis.

III

The judgment of the district court is AFFIRMED.

Appendix A

MANION, *Circuit Judge*, dissenting.

The threshold inquiry we must undertake in a qualified immunity analysis is whether plaintiff's allegations, if true, establish a constitutional violation. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). I disagree with the court's conclusion that the facts most favorable to the plaintiff are sufficient to allow a jury to conclude that Officer Shepard acted with deliberate indifference or with a reckless disregard for Steven Cavalieri's safety while Steven was detained at the Champaign County Correctional Facility (CCCF). Even if Shepard violated Steven's constitutional right by not informing CCCF of his suicide risk, he may nevertheless be shielded from liability for civil damages if his actions did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). A constitutional right is clearly established when its contours are "sufficiently clear that a reasonable official would understand that what he is doing violates that right. . . . [I]n the light of pre-existing law the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). In this case, Shepard did not have reasonable notice at the time of Steven's incarceration that the conduct alleged by the plaintiffs was unconstitutional. I therefore respectfully dissent.

The court finds that because Shepard failed to communicate Steven Cavalieri's possible suicide risk to intake officials at the CCCF, a jury could find that Shepard was deliberately indifferent under the Eighth and Fourteenth Amendments. Under the deliberate indifference standard Mrs. Cavalieri must allege facts that show that Shepard was aware of

Steven's suicide risk and nevertheless acted or failed to act with deliberate indifference to a substantial risk of serious harm to Steven's health or safety. *Farmer v. Brennan*, 511 U.S. 825, 836-37 (1994). *See also West v. Waymire*, 114 F.3d 646, 651 (7th Cir. 1997) ("plaintiff must prove that the defendant, knowing that the plaintiff (or someone) was at serious risk of being harmed, *decided not to do anything* to prevent that harm from occurring even though he could easily have done so") (emphasis added). Because suicide is a serious medical risk, the alleged facts in this case must show, under the deliberate indifference standard, that Shepard demonstrated a "reckless disregard for the known serious medical need, by inaction or woefully inadequate action." *Hudson v. McHugh*, 148 F.3d 859, 863 (7th Cir. 1998); *Sanville v. McCaughtry*, 266 F.3d 724, 740-41 (7th Cir. 2001) (holding that "[t]o be liable under the Eighth Amendment for an inmate's suicide, 'a prison official must be cognizant of the significant likelihood that an inmate may imminently seek to take his own life and must fail to take reasonable steps to prevent the inmate from performing this act'" (citation omitted)). An official may not be liable for mere negligence. *Farmer*, 511 U.S. at 836. *See also*, *Soto v. Johansen*, 137 F.3d 980, 981 (7th Cir. 1998) ("mere negligence or even gross negligence does not constitute deliberate indifference") (internal quotations and citation omitted). Moreover, officials may also escape liability "if they responded reasonably to the risk, even if the harm ultimately was not averted." *Farmer*, 511 U.S. at 844. However, by labeling as deliberate indifference Shepard's failure to communicate Steven's mother's and girlfriend's concerns over his suicide risk to CCCF intake officials, the court has equated deliberate indifference with negligence.

Appendix A

It is undisputed that Shepard did in fact take responsive action to Steven's emotional distress, but the court incorrectly holds that a jury could find that Shepard violated Steven's constitutional rights because he did not follow a better course of action.

The facts most favorable to Mrs. Cavalieri cannot establish that Shepard was deliberately indifferent to Steven Cavalieri's risk of suicide. Instead, under the "woefully inadequate" standard, *Hudson*, 148 F.3d at 863, Shepard's rather intensive involvement with Steven should reduce rather than increase his liability for deliberate indifference. Nevertheless, it appears that court faults Shepard for being too attentive by remaining personally involved with the case.

After he arrived for duty, Shepard was sent to the location where Steven had just been captured after the kidnaping and three-hour standoff with the SWAT team. As the plaintiff's brief notes, "A SWAT operation is a major event, and one involving hostages did not occur often in Champaign." Clearly everyone at the correctional facility was fully aware of the crisis, as well as Shepard when he conducted a one-hour interview with Steven at the city jail after he was first arrested. Steven was then transferred to the CCCF, where he had been incarcerated under suicide watch only weeks earlier.

After the arrest, Shepard participated in an interview with the victim, Stephanie Rouse, where she spoke of Steven's suicide threats. He also interviewed Steven's mother where she informed him that she wanted to make arrangements for Steven to see a counselor. Mrs. Cavalieri also informed Shepard that during Steven's stay at CCCF one month earlier he was on suicide watch. Shepard placed a subsequent call

to Steven at the CCCF at 11:00 a.m. where he informed Steven that his mother would be contacting him about counseling. During this last discussion, Steven told Shepard that he was fine and looking forward to seeing his mother. Finally, Shepard directed Mrs. Cavalieri to County Medical Health so that she could arrange for Steven to speak to a counselor. When Shepard called the CCCF three hours later to inform them that Rouse had complained that Steven was making harassing calls to her, he was informed that Steven had attempted suicide.

This hands-on activity on Steven's behalf cannot be described as deliberate indifference to Steven's condition. No doubt, in Shepard's two calls to the CCCF he had ample opportunity to inform someone that he thought Steven might pose a suicide risk. Yet one of those calls was specifically placed to Steven personally in order to check on his welfare and inform him about Mrs. Cavalieri's ongoing efforts to secure counseling. As a matter of law, Shepard's time, attention and concern were reasonable responses to Cavalieri's suicide risk and therefore cannot be described as "woefully inadequate." *See Perkins v. Lawson*, 312 F.3d 872, 875-76 (7th Cir. 2002) (finding no deliberate indifference when steps were taken to obtain treatment for inmate); *State Bank of St. Charles v. Camic*, 712 F.2d 1140, 1146 (7th Cir. 1983) (finding officers had not acted with deliberate indifference because, in part, they had taken reasonable actions to prevent suicide).[1] When examining a claim for deliberate indifference

1. Deliberate indifference has been found when the state actor did nothing or next to nothing in response to a substantial suicide or health risk. *See Egebergh v. Nicholson*, 272 F.3d 925, 927-28

(Cont'd)

we are obligated to examine the totality of the circumstances surrounding the alleged actions or inaction. *Dunigan ex rel. Nyman v. Winnebago County*, 165 F.3d 587, 591 (7th Cir. 1999); *see also Gutierrez v. Peters*, 111 F.3d 1364, 1375 (7th Cir. 1996) (holding that isolated instances of neglect "cannot support a finding of deliberate indifference"). At most it was a negligent act for Shepard not to inform

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(Cont'd)

(7th Cir. 2001) (holding that a jury could infer that police officers were deliberately indifferent to insulin dependent patient when they transported him to another jail without administering an insulin shot); *Sanville v. McCaughtry*, 266 F.3d 724, 740-41 (7th Cir. 2001) (holding that plaintiff had stated a claim of deliberate indifference as to prison guards when they did nothing for several hours in response to suicidal prisoner's covering of the window of his prison cell); *Reed v. McBride*, 178 F.3d 849, 854 (7th Cir. 1999) (holding that where prison officials knew about periodic substantial deprivations of food and medicine to a prisoner and did nothing for almost two years to remedy the situation, the prisoner met his burden to show an inadequate response). *See also, Jacobs v. West Feliciana Sheriff's Dept.*, 228 F.3d 388, 395-99 (5th Cir. 2000) (holding that sheriff and deputy could be found to be deliberately indifferent to plaintiff's suicide risk when they took some preventative measures but those measures were obviously inadequate and therefore not objectively reasonable); *Woodward v. Myres*, 2002 WL 31744663 (N.D. Ill. 2002) (finding that plaintiff had alleged sufficient facts to establish that intake nurse, sheriff and correctional facility doctor had acted with deliberate indifference when no actions were taken protect suicidal detainee); *Wilson v. Genessee Co.*, 2002 WL 745975 (E.D. Mich. 2002) (finding arresting officers could be found deliberately indifferent when they did nothing in response to arrestee's substantial suicide risk); *Viero v. Bufano*, 925 F. Supp. 1374, 1384 (N.D. Ill. 1996) (finding that a fact question existed as to officer's deliberate indifference when officer did not take any reasonable steps in response to suicide risk of transferee).

CCCF (where Steven had been under suicide watch only a month earlier) of Steven's current suicide risk. *See Lewis v. Richards*, 107 F.3d 549, 553-54 (7th Cir. 1997) (stating that "[e]xercising poor judgment, however, falls short of meeting the standard of consciously disregarding a known risk to his safety"). Under the court's analysis, would Shepard be off the hook had he not shown continued concern for Steven's case and not spent additional time with the victim and his mother? Had Shepard simply called CCCF and said that Steven was a possible suicide risk, he apparently would have been dismissed from the case with the other defendants.

Deliberate indifference cannot rest on negligent actions or inactions, but must instead rest on reckless indifference to the plight of an inmate. *See Mathis v. Fairman*, 120 F.3d 88 (7th Cir. 1997) (holding that prison officials could not be held liable under the reckless disregard standard for a prisoner's suicide when their actions were negligent at most). A single example of alleged neglect, based on choosing one reasonable course of action over another, will not create a jury question as to deliberate indifference, especially when the court has previously held that "showing deliberate indifference *through a pattern of neglect* entails a heavy burden." *Dunigan*, 165 F.3d at 591 (7th Cir. 1999) (emphasis added). The standard threshold for "liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process." *County of Sacramento v. Lewis*, 523 U.S. 833, 847 (1998). By equating possible negligence with deliberate indifference the court has impermissibly lowered the bar for prisoner claims under the Eighth and Fourteenth Amendments.

Even if we were to proceed with the qualified immunity analysis it has not been established that under the facts of this case, "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202. Under the standard for liability for deliberate indifference described in *West v. Waymire*, it is clear that Shepard did, in fact, *do something* to alleviate the risk of Steven's suicide. *West*, 114 F.3d at 651. Under this standard, and the wealth of case law equating deliberate indifference with inaction or woefully inadequate action, *supra* n.1, Shepard would not have understood that his conduct was unlawful. The court cites *Viero v. Bufano*, 901 F. Supp. 1387 (N.D. Ill. 1995), as standing for the proposition that adequate measures in response to a suicide risk necessarily include communicating such risk to personnel at the correctional facility. In a subsequent proceeding in that same case, the district court noted that the officer did much less than just fail to communicate the prisoner's substantial risk of suicide to the committing institution. *Viero v. Bufano*, 925 F. Supp. 1374, 1384 (N.D. Ill. 1996). The officer also failed to take the prisoner's Ritalin prescription from her mother, and, in short, failed to "take any such reasonable steps in response" to the victim's medical needs. That is not what occurred in this case. The court also cites *Egebergh v. Nicholson*, 272 F.3d 925, 927-28 (7th Cir. 2001) as relevant to the proposition that an officer must communicate all known medical information to the custodial entity. However, in *Egebergh* the officers in question were not liable for deliberate indifference because they failed to communicate to Cook County Jail personnel that the diabetic prisoner had future medical needs. *Id.* Rather, the court stated that "a jury could infer that they knew that depriving him of his morning

shot [when he was in the offending officer's sole custody] would endanger his health and that they deprived him of it for no better reason than to get him out of the police station." *Id.* at 928. I agree with the court that on the date of Cavalieri's nearly successful suicide attempt it was clearly established that a police officer on duty could not act with deliberate indifference toward a pretrial detainee who the officer believed was a substantial suicide risk. *Estate of Cole v. Fromm*, 94 F.3d 254, 258 (7th Cir. 1996). However, under this standard, an officer is only required to act reasonably, and as a matter of law, Shepard took reasonable actions in this case.

Obviously if a jury believes Shepard when he testifies that he honestly believed, after talking with Steven, that he was not a suicide risk at that time, he will not be found to be deliberately indifferent. But before going to a jury the plaintiff must allege that Shepard knew of the risk (not just should have known), knew that he should inform CCCF personnel of the risk, but deliberately or recklessly failed to do so. Instead, the plaintiff has at most alleged a negligent failure to inform CCCF of the suicide risk. That is not enough. Shepard should have been granted summary judgment along with the other named defendants.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS, DANVILLE/URBANA DIVISION DATED AND FILED OCTOBER 15, 2001

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
DANVILLE/URBANA DIVISION

Case No. 99-CV-2121

JOANN CAVALIERI, as plenary guardian of the Estate of STEVEN CAVALIERI, a disabled person,

Plaintiff,

v.

CITY OF CHAMPAIGN, a municipal corporation, DONALD SHEPARD, DALE MIHOLIC, CORBITT GRIFFITH, MARK STRZESAK, TROY DANIELS, TODD MYERS, PAT KELLY, BRAD YOHNKA, EDWARD WACHALA, SCOTT FRIEDLEIN, JOHN GNAGEY, THOMAS FROST, MARY BUNYARD, and HOLLY NEARING,

Defendants.

ORDER

This case is before the court for ruling on numerous pending Motions. Following this court's careful review of all of the documents and arguments presented by the parties, this court rules as follows: the County Defendants' Motion

to Dismiss (#81) and Plaintiff's Motion to Strike the Motion to Dismiss (#82) are denied as MOOT; Defendant Mark Strzesak's Motion for Summary Judgment (#87) is GRANTED; Defendant Donald Shepard's Motion for Summary Judgment (#89) is DENIED; Defendant Troy Daniels' Motion for Summary Judgment (#91) is GRANTED; Defendant City of Champaign's Motion for Summary Judgment (#93) is GRANTED in part and DENIED in part; the Motion to Dismiss (#95) filed by Defendants Dale Miholic, Corbitt Griffith, Todd Myers, Pat Kelly, Brad Yohnka, Edward Wachala, Scott Friedlein, John Gnagey, Thomas Frost, Mary Bunyard and Holly Nearing is GRANTED; Plaintiff's Motion to Bar Defendants' Expert (#101) is DENIED; Plaintiff's Motion to Strike (#105) is DENIED; and Plaintiff's Motion for Default Judgment (#106) is DENIED. The only Defendants remaining in this case are Shepard and the City of Champaign. This case remains set for a final pretrial conference on Monday, October 15, 2001, at 4:30 p.m., and remains set for a jury trial on Monday, October 22, 2001, at 9:30 a.m.

FACTS

On May 4,1998, Steven Cavalieri, who was 23 years old at the time, was arrested by officers of the City of Champaign Police Department for criminal trespass. The arrest stemmed from an incident at the apartment of Steven's former girlfriend, Stephanie Rouse. Steven was transported to the Champaign County Correctional Facility where he was detained until being released later that day. During the time he was detained, Cavalieri was placed on suicide watch and was seen by a mental health counselor. On May 5, 1998,

Cavalieri, who was a student at Parkland College, returned home to Berwyn, Illinois, with his mother, Joann Cavalieri. Cavalieri was very upset about being arrested, but got a job in Berwyn. His mother testified that she did not believe Cavalieri was suicidal during this period of time.

On June 3, 1998, Cavalieri drove to Champaign. During the evening of June 3, 1998, and into the early morning hours of June 4, 1998, Cavalieri took Rouse to a remote area of Urbana where he displayed a gun and made repeated threats to kill her and take his own life. Rouse convinced Cavalieri to drive back to town and they called Cavalieri's mother from a public telephone at a Perkins Restaurant. Cavalieri's mother contacted the crisis hotline. Cavalieri and Rouse left Perkins and went to a friend's apartment where they placed a call to the crisis hotline.

During the early morning hours of June 4, 1998, the crisis hotline contacted Metcad, the emergency dispatching service. Metcad notified the Champaign Police Department, and two police officers were immediately dispatched to check the welfare of a woman who was possibly being held hostage by a male who might have a gun. The two officers arrived at the apartment shortly after 3:12 a.m. A male answered their knock but would not answer the door and would not come out. A decision was made to call out the SWAT team and the hostage negotiation team. The hostage negotiation team had difficulty reaching the occupants of the apartment by telephone because the phone was off the hook. At 4:43 a.m., Thomas Frost, a member of the hostage negotiation team, was able to speak to Rouse by telephone. Rouse denied that Cavalieri was present or that she needed assistance.

She refused to come out of the apartment. Another member of the hostage negotiation team, Mary Bunyard, spoke to Cavalieri's mother around 6:00 a.m. Bunyard asked Cavalieri's mother when she had last talked to her son. According to Cavalieri's mother, she told Bunyard about the Perkins telephone calls and advised Bunyard that Cavalieri was suicidal and needed to go to a hospital. Cavalieri's mother then began driving to Champaign.

At approximately 7:28 a.m., the police introduced pepper gas into the apartment. SWAT team members entered the apartment and handcuffed and removed the occupants. Rouse and two male occupants of the apartment were removed first. Upon further search, Cavalieri was found hiding under a kitchen cabinet in the apartment. Defendant Troy Daniels, a sergeant with the Champaign police department, was a member of the SWAT team and was present when Cavalieri was removed from his hiding place. Todd Myers, a Champaign police officer, interviewed Rouse at the scene before Cavalieri was found. Rouse initially denied that Cavalieri was in the apartment or that she had seen him recently. After Cavalieri was found, Rouse told Myers that Cavalieri was suicidal. Myers reported this to someone in the Police Department, but he does not remember who. Defendant Mark Strzesak, a detective with the Champaign police department, spoke to Rouse briefly at the scene and asked her to come to the Champaign Police Department for an interview.

Cavalieri was arrested and taken to the Champaign Police Department. Lieutenant Holly Nearing was in charge of the investigation and met with her command sergeants, including Daniels, to make sure that the investigation of the crime

would be commenced. Daniels made specific assignments to personnel. Brad Yohnka, a detective with the Champaign police department, testified that Daniels was the "case manager." Defendant Donald Shepard, a detective with the Champaign police department, was assigned to interview Cavalieri. Shepard was told that Cavalieri might know the whereabouts of the gun and was instructed to find out about it. Shepard's interview with Cavalieri began at 8:47 a.m. and lasted about one hour. During the interview, Cavalieri denied knowing anything about a gun and denied harming or threatening anyone. Cavalieri told Shepard he had been arrested before and that the jail had let him talk to someone then. He wanted to know if he could talk to someone this time. Shepard told him the jail personnel would be able to arrange for him to see someone. It was up to Shepard how Cavalieri would be handled following the interview.

Around 10:00 a.m., Dale Miholic, a Champaign police officer, transported Cavalieri to the Champaign County Correctional Facility, where he was to be booked and held. The County handles all of the bookings for everyone arrested by the Champaign Police Department. Miholic testified that Cavalieri did not say anything to him on the ride to the jail. Miholic did not know anything about the circumstances of Cavalieri's arrest and just delivered the required papers to the intake officer which identified Cavalieri and the stated charge against him, unlawful restraint. Cavalieri was processed and an initial intake screening was performed by a Champaign County Sheriff's Deputy. During this screening, Cavalieri denied having suicidal thoughts and denied ever attempting suicide. Cavalieri did ask to see a mental health counselor and was told this would be set up. Cavalieri was

assigned to a holding cell in the booking area for further processing later that afternoon. The holding cell contained a telephone with a strong metal cord. The telephone could be used only for outgoing collect calls.

After his interview with Cavalieri, Shepard checked in with Daniels. Daniels told him to brief Strzesak, who was in the process of interviewing Rouse. At 10:03 a.m., Shepard joined Strzesak's interview with Rouse. During that tape-recorded interview, Rouse told Strzesak and Shepard about the events of the earlier evening and morning, including Cavalieri's threat to kill her and himself with his gun. Rouse's statement was interrupted at 10:17 a.m. because of a previously made appointment of Strzesak's. During the interruption, Strzesak and Shepard "briefed" Daniels on the statement being given by Rouse. Neither Shepard nor Strzesak remembers what they told Daniels. After the interruption, the interview continued. Rouse told Shepard and Strzesak that, at Perkins, Cavalieri told her that if he ever got arrested again, he would kill himself. Rouse stated that she "thought he was serious and he had the gun on him." Rouse stated that Cavalieri made additional threats to kill himself and told her that he tried to commit suicide once before. Shepard testified that, after completing the interview, he and Strzesak briefed Daniels on the outcome of the interview. Shepard testified that he did not remember what he said to Daniels. Daniels testified at his deposition that he was not told at any time that day that Cavalieri had threatened to hurt himself or that Cavalieri was suicidal. After the interview, which concluded at 10:48 a.m., Strzesak took Rouse to the mental health center. Strzesak was given no further assignments on the case.

Appendix B

Between 10:45 and 11:00 a.m., Cavalieri's mother arrived at the Champaign Police Department. She was interviewed by Shepard and other officers. Cavalieri's mother told Shepard that she wanted to make arrangements to get a counselor to see her son because he had seen a counselor the previous time he was arrested. Cavalieri's mother testified at her deposition that she told Shepard about Cavalieri's mental condition, calls to the crisis line, that he had been on suicide watch when he was arrested in May, and that he needed to be on suicide watch and not be alone. According to Cavalieri's mother, Shepard promised her that Cavalieri was not alone. Cavalieri's mother testified that she wanted to leave to go see her son but Shepard and other detectives wanted to talk with her further and wanted her to sign a search warrant for Cavalieri's car. Around 11:00 a.m., Shepard called the jail and talked to Cavalieri. Shepard testified that he told Cavalieri that his mother would be there to see him and that she was going to arrange a counselor for him.Shepard testified that Cavalieri said he was "okay" and was looking forward to seeing his mother. Cavalieri's mother testified that she asked Shepard if Cavalieri was alone and Shepard told her he was not going to be alone. At about 11:30 a.m., Shepard led Cavalieri's mother to Champaign County Mental Health so she could talk to them about Cavalieri. After Shepard's meeting with Cavalieri's mother, Shepard did not make any calls to the jail to advise them that Cavalieri might be a suicide risk. In the meantime, Cavalieri's car was towed to the Police Department and searched. A gun was found in the car.

Appendix B

Shepard testified that; following his interview of Cavalieri and Rouse, and after speaking to Cavalieri's mother, he did not believe that Cavalieri was a suicide risk. Shepard said his belief was based upon the following facts and observations: although Rouse had said that Cavalieri had threatened to kill her, she also said he later told her he would not hurt her and apologized to her; Cavalieri was calm when Shepard interviewed him; Cavalieri was already under arrest and had no weapon; he was in custody and in a safe place; and, when Shepard talked to him on the telephone at the jail, he said he was fine and would wait to talk to his mother. Shepard testified that Rouse called him and told him that Cavalieri was calling her from the jail. Shepard called the jail and told them to put a stop to Cavalieri calling her. He testified that he was told there was an emergency at the jail and later learned that it was Cavalieri.

At approximately 2:10 p.m., Cavalieri was found in the holding cell, unconscious, hanging from the telephone cord. Jail personnel performed CPR on Cavalieri. He did not regain consciousness and was taken to the hospital by ambulance. Cavalieri's mother arrived at the jail around 2:30 p.m. and saw the ambulance leaving. Later that afternoon, Daniels went to the hospital to check on Cavalieri's condition and to see if there was any information that officials from the jail might need from the City. Daniels testified that he spoke to Sheriff David J. Madigan at the hospital. Daniels testified that he told Madigan he was sorry someone the City had brought over to the jail had attempted suicide and that it was going to cause Madigan a lot of stress and a lot of work. Madigan testified that Daniels said something to the effect of that he was "sorry that we didn't know or we didn't tell

you that, you know, the circumstances behind Mr. Cavalieri's arrest." Officer Todd Lawhead of the Champaign County Sheriff's Office testified that he was present at the hospital and heard Daniels tell Madigan "that they should have told us about his condition or his state of mind or something along those lines." However, Madigan testified that he did not recall Daniels' exact words and that Daniels "made some apologetic statement." Lawhead stated that he did not know what Daniels said "word for word." Cavalieri was in the hospital until July 17, 1998. Cavalieri remains essentially in an unresponsive state and resides in a nursing home near his mother's residence.

On June 3, 1999, Cavalieri filed his original Complaint (#1) in this case alleging a violation of his constitutional rights pursuant to 42 U.S.C. § 1983, and state law causes of action for personal injury caused by willful and wanton conduct, and personal injury caused by willful and wanton conduct based upon failure to train. On February 16, 2000, an Amended Complaint (#46) was filed. Cavalieri's mother, as plenary guardian of the estate of Steven Cavalieri, a disabled person, was substituted as Plaintiff. On March 8, 2001, Plaintiff filed her Second Amended Complaint (#79) against Defendants County of Champaign, Champaign County Sheriff's Office, Jeremy Hostetler, Laurie Brauer, Veda Barrett, Jeffrey Ogle, Michael Gass, and Bradley Morris (County Defendants), as well as Defendants City of Champaign, Donald Shepard, Dale Miholic, Corbitt Griffith, Mark Strzesak, Troy Daniels, Todd Myers, Pat Kelly, Brad Yohnka, Edward Wachala, Scott Friedlein, John Gnagey, Thomas Frost, Mary Bunyard, and Holly Nearing (City Defendants).

Appendix B

On June 18, 2001, the County Defendants filed a Joint Motion for Good Faith Settlement Finding and to Ultimately Dismiss Claims against Certain Defendants (#83). A hearing was held on this Motion before Magistrate Judge David G. Bernthal on June 25, 2001. On July 18, 2001, this court entered an Order (#99) which was agreed to and signed by all of the parties to this case. This court found that the settlement between Plaintiff and the County Defendants was done in good faith. Accordingly, this court dismissed, with prejudice, the County Defendants. The City Defendants have filed Motions for Summary Judgment and a Motion to Dismiss, which remain pending.

ANALYSIS

I. COUNTY DEFENDANTS' MOTION TO DISMISS AND PLAINTIFF'S MOTION TO STRIKE MOTION TO DISMISS

As noted, the County Defendants entered into a settlement agreement with Plaintiff. On July 18, 2001, this court entered an Order (#99) finding that the settlement agreement was done in good faith and dismissing the County Defendants from the action, with prejudice. Accordingly, the County Defendants' Motion to Dismiss (#81) and Plaintiff's Motion to Strike the Motion to Dismiss (#82) are now MOOT. Accordingly, both Motions (#81, #82) ale denied as MOOT.

Appendix B

II. PLAINTIFF'S MOTION TO BAR EXPERT

On July 25, 2001, Plaintiff filed a Motion to Bar Defendants' Expert (#101). Plaintiff stated that the City Defendants did not timely disclose their expert, John Bowman, and did not provide a report from Bowman as required by Rule 26(a)(2) of the Federal Rules of Civil Procedure. Defendants filed a response to the Motion on August 13, 2001. Defendants noted that their expert disclosure was sent to Plaintiff on July 9, 2001, the date it was due. Defendants also stated that a copy of Bowman's written report was faxed to Plaintiff on August 9, 2001, the same date Defendants received it. Defendants further stated that, if Plaintiff wanted to disclose a rebuttal witness following the deposition of Bowman, Defendants would not object on the basis of timeliness. Defendants therefore argued that Plaintiff has not suffered any prejudice by the late production of Bowman's written report. This court agrees with Defendants that Plaintiff has not shown prejudice. Accordingly, Plaintiff's Motion to Bar Defendants' Expert (#101) is DENIED.

III. PLAINTIFF'S MOTION TO STRIKE AND MOTION FOR DEFAULT

On August 5, 2001, Plaintiff filed a Motion to Strike (#105) asking this court to strike Defendants' Motions for Summary Judgment or, in the alternative, to strike those portions of Defendants' Motions for Summary Judgment that raise matters which must be pled as affirmative defenses. Plaintiff noted that none of the City Defendants had filed an Answer to Plaintiff's Second Amended Complaint (#79).

Plaintiff also filed a Motion for Default (#106). In this Motion, Plaintiff stated that the City Defendants did not file an Answer to the Amended Complaint (#46) or the Second Amended Complaint (#79). Plaintiff argued that this was grounds for the entry of default judgment pursuant to Rule 55 of the Federal Rules of Civil Procedure.

On August 13, 2001, Defendants filed their Response to Plaintiff's Motion for Default and Plaintiff's Motion to Strike and Defendants' Motion for Leave to File Answer, Instanter (#119). This court, by minute entry dated August 14, 2001, granted Defendants' Motion for Leave to File Answer, Instanter (#119). Defendants' Answer to Second Amended Complaint (#117) has been filed in this court.

In their Response, Defendants asked that Plaintiff's Motion for Default and Motion to Strike be denied. Defendants argued that they have defended this case vigorously and have cooperated in the discovery requested by Plaintiff. Defendants stated that they raised the affirmative defenses of qualified immunity and state tort immunity in their Motion to Dismiss. Defendants also argued that their Motions for Summary Judgment were timely filed and raised no issues unknown to Plaintiff.

This court agrees with Defendants and concludes that Plaintiff has not been prejudiced by Defendants' apparently inadvertent failure to file an Answer to the Amended Complaint and Second Amended Complaint. This court concludes that the case relied on by Plaintiff is inapposite and clearly distinguishable. In *Powell v. Cook County Bd.*

of Comm'rs, 1993 WL 286550, at *1 (N.D. Ill. 1993), the court found that the defendant had exhibited a pattern of unacceptable behavior and contumacious conduct. This unacceptable conduct included numerous late filings and failure to file answers to the plaintiff's complaints. *Powell*, 1993 WL 286550, at *1-2. In *Powell*, after the plaintiff filed a motion for default judgment, the defendant still did not file answers and, instead, "repeatedly misrepresented the court's rulings and continued to obstruct the proper pleading system." *Powell*, 1993 WL 286550, at *2. Moreover, in *Powell*, the defendant had dragged its feet during the course of discovery and failed to cooperate in good faith in pretrial procedures. *Powell*, 1993 WL 286550, at *3-4. Based upon all of the defendant's unprofessional conduct, the court in *Powell* concluded that a default judgment was warranted. *Powell*, 1993 WL 286550, at *5.

In this case, Defendants filed a timely Motion to Dismiss (#3) Plaintiff's original complaint. This Motion was granted, and Plaintiff was allowed leave to file an Amended Complaint. After being allowed an extension of time by the court, Defendants filed a timely Motion to Dismiss the Amended Complaint (#56) with an extensive and lengthy Memorandum in Support (#60). In their Motion to Dismiss (#56), Defendants raised the issues of qualified immunity and state tort immunity. In addition, the record shows that Defendants have participated in extensive discovery and all pretrial procedures. Most importantly, when Plaintiff pointed out the lack of an Answer in her Motion to Strike and Motion for Default, Defendants responded by seeking leave to file their Answer, Instanter. Therefore, this court agrees with

Defendants that they have vigorously defended the case and have not engaged in any conduct which could be considered unacceptable or contumacious. Accordingly, this court concludes that default is not warranted in this case. This court further finds that Plaintiff has not been unfairly surprised by any issues raised in Defendants' Motions for Summary Judgment and that striking the Motions for Summary Judgment is not warranted. Therefore, Plaintiff's Motion to Strike (#105) and Motion for Default (#106) are DENIED.

IV. MOTION TO DISMISS

On July 6, 2001, Defendants Miholic, Griffith, Myers, Kelly, Yohnka, Wachala, Friedlein, Gnagey, Frost, Bunyard and Nearing filed a Motion for Dismissal (#95). These Defendants claimed that Plaintiff had stipulated to the dismissal of each of these Defendants and asked that they be dismissed with prejudice. On July 25, 2001, Plaintiff filed a Response to Defendants' Motion for Dismissal (#100). Plaintiff stated that she is willing to stipulate only to a dismissal without prejudice.

At this stage of the proceedings, a plaintiff may voluntarily dismiss without prejudice under Rule 41(a)(2) of the Federal Rules of Civil Procedure only if the plaintiff persuades the district court and establishes that voluntary dismissal without prejudice is warranted. *See Tolle v. Carroll Touch, Inc.*, 23 F.3d 174, 177 (7th Cir. 1994). It is an abuse of the district court's discretion to allow such a voluntary dismissal where the defendant will suffer "plain legal prejudice" as a result of the dismissal. *Federal Deposit Ins.*

Corp. v. Knostman, 966 F.2d 1133, 1142 (7th Cir. 1992); *Webb v. Altec Indus., Inc.*, 1994 WL 162815, at *1 (N.D. Ill. 1994). The factors to be considered in determining whether a defendant will suffer "plain legal prejudice" are:

> [T]he defendant's effort and expense of preparation for trial, excessive delay and lack of diligence on the part of the plaintiff in prosecuting the action, insufficient explanation for the need to take a dismissal, and the fact that a motion for summary judgment has been filed by the defendant. *Federal Deposit Ins. Corp.*, 966 F.2d at 1142, *quoting Pace v. Southern Express Co.*, 409 F.2d 331, 334 (7th Cir. 1969).

In this case, Plaintiff has provided no explanation why the dismissal of these 11 Defendants should be without prejudice. This court concludes that these Defendants would suffer "plain legal prejudice" if the dismissal were allowed to be without prejudice. These Defendants did not file a Motion for Summary Judgment based upon Plaintiff's decision to agree to their dismissal from the action. This court notes that, based upon the discovery materials which have been filed in this court, such a Motion for Summary Judgment would almost certainly have been successful. Because Plaintiff decided to forego pursuing these Defendants at this late date in this action, it would be highly prejudicial to these Defendants to allow Plaintiff the opportunity to drag them back into court in a newly filed action. This court accordingly concludes that the dismissal of these Defendants must be with prejudice. Therefore, Defendants' Motion for Dismissal (#95) is GRANTED.

Appendix B

V. MOTIONS FOR SUMMARY JUDGMENT

On July 6, 2001, Defendants Strzesak, Shepard, Daniels and City of Champaign each filed a separate Motion for Summary Judgment (#87, #89, #91, #93). The Motions are now fully briefed and ready for ruling.

A. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). In ruling on a motion for summary judgment, a district court has one task and one task only: to decide, based upon the evidence of record, whether there is any material dispute of fact that requires a trial. *Waldridge v. American Hoechst Corp.*, 24 F.3d 918, 920 (7th Cir. 1994). A genuine issue for trial "exists only when a reasonable jury could find for the party opposing the motion based on the record as a whole." *Michas v. Health Cost Controls of Ill., Inc.*, 209 F.3d 687, 692 (7th Cir. 2000), *quoting Pipitone v. United States*, 180 F.3d 859, 861 (7th Cir. 1999). In making this determination, the court must consider the evidence in the light most favorable to the party opposing summary judgment. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). However, a plaintiff must do more than raise a metaphysical doubt as to the material facts and, instead, must present definite, competent evidence to rebut the motion. *Michael v. St. Joseph County*, 259 F.3d 842, 845 (7th Cir. 2001).

Appendix B

B. SECTION 1983 ACTION

Defendants Strzesak, Shepard and Daniels first argue that they are entitled to judgment on Plaintiff's claim against them based upon 42 U.S.C. § 1983 because the evidence does not show that any of the Defendants were "deliberately indifferent" to Plaintiff's rights. Defendants also argue that they did not violate any clearly established constitutional right of Plaintiff and are entitled to qualified immunity on this claim.

When considering whether Defendants Strzesak, Shepard and Daniels are subject to liability under § 1983, this court must follow the long-settled rule that "[s]ection 1983 creates a cause of action based upon personal liability and predicated upon fault; thus, liability does not attach unless the individual defendant caused or participated in the constitutional violation." *Payne for Hicks v. Churchich*, 161 F.3d 1030, 1039 (7th Cir. 1998), *cert. denied*, 527 U.S. 1004 (1999). The purpose of § 1983 is to deter state actors from using a "badge of authority" to deprive individuals of rights guaranteed by the Constitution. *Payne*, 161 F.3d at 1039 (citations omitted). Therefore, negligent conduct is not enough for the imposition of liability under § 1983. *Mathis v. Fairman*, 120 F.3d 88, 91 (7th Cir. 1997), *cert. denied*, 522 U.S. 1016 (1997); *Dugan v. Washington*, 2001 WL 741626, at *4 (N.D. Ill. 2001). Allegations that a state actor could have or should have done more simply are not enough to entitle a plaintiff to relief under § 1983. *See Sanville v. McCaughtry*, __ F.3d __, 2001 WL 1117363, at *9-10 (7th Cir. 2001) (doctors' failure to correctly diagnose and treat an inmate who committed suicide not sufficient to create liability under § 1983); *Estate of*

Appendix B

Novack v. County of Wood, 226 F.3d 525, 530 (7th Cir. 2000) (in case where inmate committed suicide, jail officials not liable under § 1983 even though they were informed that he was a potential risk for suicide and he exhibited some bizarre behavior while in jail).

In her Response to the Motions for Summary Judgment, Plaintiff argues that Cavalieri's constitutional rights were violated because he should not have been taken to the jail at all and should have instead undergone a mental health evaluation and been afforded psychological care or, in the alternative, the jail personnel should have been alerted by Defendants as to what was known about Cavalieri.

This court concludes that Plaintiff's claims are based upon Cavalieri's treatment while an arrestee in pretrial detention. It is now well settled that an arrestee in pretrial detention is protected by the Fourteenth Amendment's due process clause rather than the Eighth Amendment's prohibition against cruel and unusual punishment, which applies only to convicted persons. *Collignon v. Milwaukee County*, 163 F.3d 982, 986 (7th Cir. 1998); *see also Payne*, 161 F.3d at 1039. Cavalieri, who was arrested based upon probable cause and was later taken to jail, was a pretrial detainee, a person "[b]etween the status of free citizen and convicted prisoner." *See Payne*, 161 F.3d at 1040, quoting *Wilson v. Williams*, 83 F.3d 870, 875 (7th Cir. 1996). The Seventh Circuit has held that the due process standard which applies to a pretrial detainee is at least as great as the protection a convicted prisoner is afforded under the Eighth Amendment. *Payne*, 161 F.3d at 1040; *Estate of Cole by Pardue v. Fromm*, 94 F.3d 254, 259 (7th Cir. 1996),

cert. denied, 519 U.S. 1109 (1997); *Hall v. Ryan*, 957 F.2d 402, 405 (7th Cir. 1992). "When the § 1983 claim is based upon a jail suicide, the degree of protection accorded a detainee is the same that an inmate receives when raising an inadequate medical attention claim under the Eighth Amendment—deliberate indifference." *Payne*, 161 F.3d at 1041. A finding of deliberate indifference requires evidence that the official was aware of the risk and consciously disregarded it. *Payne*, 161 F.3d at 1041. The deliberate indifference standard is a subjective one. *Novack*, 226 F.3d at 529. It is not enough that there was a danger of which an official should have been aware. *Novack*, 226 F.3d at 529. The official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference. *Sanville*, 2001 WL 1117363, at *7, *citing Farmer v. Brennan*, 511 U.S. 825, 837 (1994); *Novack*, 226 F.3d at 529; *Payne*, 161 F.3d at 1040 n.11.

This court notes that Plaintiff's Second Amended Complaint alleges a violation of Cavalieri's Fourth Amendment rights. This court further notes that it was clearly incorrect when, in ruling on Defendants' Motions to Dismiss, it stated that the Fourth Amendment applied to Cavalieri's claims.[1] However, this earlier incorrect ruling is immaterial because Plaintiff does not dispute that the standard which applies here is deliberate indifference.

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1. The Fourth Amendment covers only searches and seizures. *Payne*, 161 F.3d at 1039 n.10; *Viero v. Bufano*, 925 F. Supp. 1374, 1382 n.15 (N.D. Ill. 1996).

Appendix B

Based upon the applicable standard, an arresting police officer can be held liable for a detainee's suicide only if the defendant was deliberately indifferent to a substantial suicide risk. *Payne*, 161 F.3d at 1042. Knowledge of a substantial risk of suicide can be inferred from the obviousness of the risk. *Payne*, 161 F.3d at 1042; *see also Woodward v. Myres*, 2001 WL 506863, at *4 (N.D. Ill. 2001).

This court concludes that the facts are not sufficient to show deliberate indifference on the part of Strzesak. First of all, Strzesak only talked to Rouse briefly at the scene and had no responsibility regarding the transportation of Cavalieri to the jail. This court concludes, based upon the evidence, that Strzesak was not "deliberately indifferent" to Cavalieri's alleged right to be taken for treatment rather than to the jail. Second, the facts show that Strzesak interviewed Rouse at the Police Department and received information from her that Cavalieri threatened to kill Rouse and threatened to kill himself during the events which unfolded the prior evening and early morning. Rouse told him that Cavalieri stated he would kill himself if he was arrested again. Rouse testified that she believed Cavalieri was serious about his threat to kill himself when he had the gun. This court cannot conclude that Strzesak had information which made the risk that Cavalieri might commit suicide "obvious" because the incident with Rouse was over, Cavalieri had already been arrested and interviewed and had already been transported to the jail. This court concludes that the evidence does not show that Strzesak was aware of facts from which the inference could be drawn that a substantial risk of serious harm existed, and that he drew that inference. Strzesak's conduct in not taking further action based upon the inform-

ation provided by Rouse could only support a claim of negligence, not deliberate indifference. *See Payne*, 161 F.3d at 1041.

This court reaches the same conclusion regarding Daniels. Daniels was a member of the SWAT team and observed Cavalieri being removed from his hiding place in the apartment. However, there is no evidence that Daniels had any information at that time that Cavalieri was in need of immediate medical care. In addition, this court notes that the videotape of the television news report on this incident provided to this court by Plaintiff shows that, at the time of his arrest, Cavalieri appeared calm and cooperative. Therefore, this court must conclude that there is no evidence to show that Daniels was deliberately indifferent because Cavalieri was not provided medical care and was instead taken to the jail. Moreover, Daniels' testimony that he was never told that Cavalieri had threatened to hurt himself or that Cavalieri was suicidal has not been disputed. Strzesak and Shepard testified that they "briefed" Daniels about the outcome of the interview with Rouse. However, neither remembered exactly what was said to Daniels. Plaintiff argues that there was testimony that Daniels was the case manager and that it can be inferred that he received information from various officers that Cavalieri was suicidal. However, there is no evidence of that and this court concludes it could just as reasonably be inferred that Daniels only received information relevant to the investigation of the crime. Plaintiff essentially argues that, as case manager, Daniels should have known that Cavalieri was suicidal and should have acted on what he should have known. This kind of argument may be persuasive if the standard here was

negligence. However, this court finds this argument much too attenuated to justify a finding that there is a genuine issue of material fact regarding whether Daniels acted with deliberate indifference to an obvious risk of suicide.

Plaintiff also points out Daniels' acknowledgment of guilt expressed to Madigan and Lawhead. However, neither Madigan nor Lawhead were certain what Daniels said. Madigan's testimony that Daniels "made some apologetic statement" is entirely consistent with Daniels testimony that he told Madigan he was sorry it happened, a very understandable sentiment. This court concludes that the vague testimony regarding Daniels' apology at the hospital is not sufficient to raise a genuine issue of material fact regarding whether Daniels acted with deliberate indifference in this case. Plaintiff also notes that Madigan testified that, if the jail had been informed that Cavalieri was arrested as part of a SWAT operation involving a hostage situation, a fact which Daniels certainly knew, Cavalieri would have been put on a suicide watch. This court concludes that this testimony by Madigan is irrelevant and completely self-serving. This court fails to see how the fact that Cavalieri was arrested as part of a SWAT operation had any bearing on his potential suicide risk. Most importantly, if Champaign County believed it was important to have this information regarding arrestees brought to the County for booking, the County should have had a procedure in place for requiring it. However, it is undisputed that such a procedure does *not* exist and the transporting officer is only required to provide the proper commitment papers. This required information was provided in Cavalieri's case. Again, this court concludes

that this testimony by Madigan is not sufficient to raise a genuine issue of material fact regarding whether Daniels acted with deliberate indifference.

This court reaches a different conclusion regarding Shepard, however. The evidence shows that Shepard conducted the interview with Cavalieri and, during the interview, Cavalieri did not threaten to commit suicide or exhibit any conduct which made Shepard conclude that he was a risk of suicide. This evidence is uncontradicted. This court therefore again concludes that there is no evidence to show that Shepard was deliberately indifferent to Cavalieri's rights when he made the decision to have him transported to the jail rather than providing him with medical treatment. Shepard also participated in the interview with Rouse. This court concludes, as it did earlier in discussing Strzesak, that Shepard was not deliberately indifferent when he did not act based upon the information received from Rouse. However, Shepard is in a different posture from Strzesak because he then talked to and interviewed Cavalieri's mother. According to Cavalieri's mother, she told Shepard about Cavalieri's mental condition, calls to the crisis line, that he had been on suicide watch when he was arrested in May, and that he needed to be on suicide watch and not be alone. According to Cavalieri's mother, Shepard promised her that Cavalieri was not alone. Shepard disputes that Cavalieri's mother made these statements or that he made such a promise. However, elementary summary judgment principles reject the notion that this sort of factual dispute can be resolved at the summary judgment stage. *See Viero*, 925 F. Supp. at 1383. This court therefore concludes that there remains a genuine issue of material fact regarding whether Shepard was subject-

ively aware of a substantial suicide risk and acted with deliberate indifference when he made no attempt to advise the jail that Cavalieri was potentially suicidal and should be watched closely and not be left alone. The court in *Payne* specifically noted, in finding that the arresting officer did not act with deliberate indifference, that the officer did not have any warnings from family members of a mental disturbance and suicidal condition. *See Payne*, 161 F.3d at 1042. Cavalieri's mother testified that Shepard had such a warning in this case. A jury could find that Shepard was deliberately indifferent to a substantial suicide risk when he did not contact the jail after his interview with Cavalieri's mother.

This court must now determine whether Shepard is entitled to qualified immunity.[2] "Qualified immunity shields government officials performing discretionary functions from liability for civil damages unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known." *Sanville*, 2001 WL 1117363, at *5. Shepard argues that there is no case law extending a duty to provide anything to Cavalieri after custody had been transferred. However, this court concludes that it was clearly established, in 1998, that a police officer could be liable for a pretrial detainee's suicide if he was

2. Because this court has concluded that the conduct of Strzesak and Daniels did not violate Cavalieri's constitutional rights, this court does not need to consider whether they are entitled to qualified immunity. However, this court notes that it would have no trouble concluding, based upon the facts presented, that Strzesak and Daniels violated no clearly established right and would be entitled to qualified immunity.

deliberately indifferent to a substantial suicide risk. *See Payne*, 161 F.3d at 1042. In this case, Cavalieri's mother testified that she told Shepard that Cavalieri was a suicide risk and that Shepard repeatedly assured her that Cavalieri would not be alone at the jail. Therefore, there is a genuine issue of material fact regarding whether Shepard acted with deliberate indifference to a substantial suicide risk. Accordingly, Shepard is not entitled to qualified immunity. *See Viero*, 925 F. Supp. at 1387 (qualified immunity is a non-factor in § 1983 cases where plaintiffs must prove deliberate indifference).

C. TORT IMMUNITY FOR STATE LAW CLAIMS

In Count VI of her Second Amended Complaint, Plaintiff has alleged a cause of action against Defendants Strzesak, Shepard and Daniels entitled "Personal Injury/Willful and Wanton." In Count VII, Plaintiff has alleged a cause of action for "Personal Injury/Willful and Wanton" against the City of Champaign based upon respondeat superior.

In their Motions for Summary Judgment, Defendants argue that they are entitled to tort immunity under Illinois law for these state law claims. Defendants argue that they have immunity based upon § 2-201 and § 4-105 of the Local Governmental and Governmental Employees Tort Immunity Act (Act) (745 Ill. Comp. Stat. 10/2-201, 10/4-105 (West 2000)). Plaintiff argues that only § 4-105 applies to these facts.

Appendix B

Section 4-105 of the Act provides:

> Neither a local public entity nor a public employee is liable for injury proximately caused by the failure of the employee to furnish or obtain medical care for a prisoner in his custody; but this Section shall not apply where the employee, acting within the scope of his employment, knows from his observation of condition that the prisoner is in need of immediate medical care and, through willful and wanton conduct, fails to take reasonable action to summon medical care. Nothing in this Section requires the periodic inspection of prisoners. 745 Ill. Comp. Stat. 10/4-105 (West 2000).

By its terms, this section does not provide immunity if the conduct is willful and wanton.

In this case, this court has already concluded that Strzesak and Daniels did not act with deliberate indifference to Cavalieri's rights. Therefore, this court concludes that their conduct was not willful and wanton. Accordingly, Strzesak and Daniels are entitled to tort immunity under § 4-105.

However, this court concluded that a genuine issue of material fact exists in this case regarding whether Shepard acted with deliberate indifference because of the information Cavalieri's mother testified she provided to him and the promises Cavalieri's mother claims he made to her. The Act defines willful and wanton conduct as "an actual or deliberate intention to cause harm or which, if not intentional, shows

an utter indifference to or conscious disregard for the safety of others." 745 Ill. Comp. Stat. 10/1-201 (West 2000). The Illinois Supreme Court has added that willful and wanton conduct shows a "reckless disregard for the safety of others, such as a failure, after knowledge of impending danger, to exercise ordinary care to prevent it or a failure to discover the danger through recklessness or carelessness." *Hayes v. City of Des Plaines*, 182 F.R.D. 546, 551 (N.D. Ill. 1998), *quoting Lynch v. Board of Educ. of Collinsville*, 412 N.E.2d 447, 457 (Ill. 1980). The definitions of "willful and wanton" in both the Act and in *Lynch* are essentially the same as the definition of "deliberate indifference" under federal constitutional law. *Bragado v. City of Zion/Police Department*, 788 F. Supp. 366, 372 (N.D. Ill. 1992). In this case, this court concludes that Shepard's conduct could be considered willful and wanton and, therefore, Shepard is not entitled to immunity under § 4-105.

Section 2-201 of the Act states:

> Except as otherwise provided by Statute, a public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such discretion even though abused. 745 Ill. Comp. Stat. 10/2-201 (West 2000).

Shepard argues that he is entitled to the blanket immunity provided by § 2-201 of the Act because his actions regarding Cavalieri were discretionary as they required some form of

judgment and were not ministerial tasks. *See In re Chicago Flood Litigation*, 680 N.E.2d 265, 272 (Ill. 1997).

Plaintiff points out that immunity pursuant to § 2-201 of the Act applies only if the act or omission was both an exercise of discretion and a policy determination. Plaintiff is correct that the Illinois Supreme Court has held that the language of § 2-201 is clear that immunity will not attach unless the plaintiff's injury results from acts performed or omitted by the public employee in determining policy *and* in exercising discretion. *Harinek v. 161 North Clark Street Ltd. P'ship*, 692 N.E.2d 1177, 1181 (Ill. 1998); *see also Payne*, 161 F.3d at 1045; *Torres v. City of Chicago*, 123 F. Supp. 2d 1130, 1133 (N.D. Ill. 2001); *Hayes*, 182 F.R.D. at 551 n.7. In this case, this court has no trouble agreeing with Defendants that Shepard was exercising his discretion in his actions regarding Cavalieri. However, Defendants do not even argue that Shepard was also determining policy. Accordingly, this court agrees with Plaintiff that § 2-201 of the Act does not provide immunity to Shepard. *See Hayes*, 182 F.R.D. at 552 (police officers were not entitled to immunity under § 2-201 because, while they exercised discretion in deciding to leave suspect in interview room with a pay telephone, they were not making policy determinations).

In its Motion for Summary Judgment, the City of Champaign argues that it cannot be liable for "Personal Injury/ Willful and Wanton" based upon respondeat superior if none of the individual Defendants are liable. The City notes that § 2-109 of the Act provides that "[a] local public entity is not liable for an injury resulting from an act or omission of its employee where the employee is not liable." 745 Ill. Comp.

Stat. 10/2-109 (West 2000). However, although this court has concluded that Strzesak and Daniels are entitled to immunity and are not liable, this court concluded that Shepard is not entitled to immunity. Accordingly, the City may be liable based upon Shepard's actions under respondeat superior. Therefore, neither Shepard nor the City are entitled to summary judgment on Plaintiff's claim of "Personal Injury/ Willful and Wanton."

D. STATE LAW CLAIM FOR FAILURE TO TRAIN

Plaintiff alleged in her Second Amended Complaint that the City is also liable for "Personal Injury/Willful and Wanton" based upon its violation of its "duty to train its employees to provide adequate and sufficient screening of arrestees, to provide adequate supervision of arrestees, to be familiar with an arrestee's prior court and police records and prior incarcerations at the Champaign County Correctional Facility, to assess an arrestee's medical/psychological condition, to provide prompt and sufficient emergency and medical/psychological treatment, to communicate and exchange information in regard to an arrestee, and to take appropriate measures to safeguard an arrestee's well-being during the time in which he was in their custody."

In support of the City's Motion for Summary Judgment, Defendants have provided the affidavit of Holly Nearing which states:

> 1. I am a lieutenant in the Champaign Police Department and was as of June 4, 1998. I am

currently the officer in charge of training within the Champaign Police Department.

2. I have reviewed the training files of Troy Daniels, Mark Strzesak and Donald Shepard. These files are maintained by the Champaign Police Department in the ordinary course of business and reflect the training of each officer.

3. Prior to June 4, 1998, and at all times since then, each of these officers has received all training mandated by the law of the State of Illinois.

4. Each officer received training from the University of Illinois Police Training Institute and graduated from that institute. Training at the Police Training Institute included a block of instruction on dealing with variant behavior, which included training on identification and handling of suicidal and mentally disturbed persons.

The City argues that the training of police officers is governed by the Illinois Police Training Act (50 Ill. Comp. Stat. 705/1 et seq. (West 2000)). The City argues that the evidence shows that each of the remaining Defendant officers was trained in accordance with Illinois law. The City further points out that Plaintiff's expert testified that proper training for police officers would include at least a four hour block on dealing with mentally unstable subjects, training which Strzesak, Daniels and Shepard received.

In response, Plaintiff notes that, in denying the City's Motion to Dismiss, this court previously ruled that "meeting the statutory requirements [of the Training Act] does not necessarily ensure that the City has fulfilled its duty." Plaintiff also argues that Strzesak's testimony showed that he was not aware of any protocols or policies that the department had for dealing with how personnel should handle arrestees who are either in medical need or have mental health issues. Plaintiff further states that its "failure to train" claim is based upon 42 U.S.C. § 1983.

This court first agrees with the City that Plaintiff's Second Amended Complaint does not state that this claim is based upon 42 U.S.C. § 1983.[3] This court also agrees with the City that Plaintiff has presented no evidence to this court which shows that the training provided by the City was deficient, that the City knew or should have known of the deficiencies, and in the face of this knowledge recklessly or willfully failed to provide additional training. Accordingly, this court now concludes that Plaintiff has failed to provide sufficient evidence that there was any "willful and wanton" failure to train on the part of City which caused injury to Cavalieri. Therefore, this court concludes that the City is entitled to summary judgment on this claim.

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3. This court further concludes that such a claim would fail. In *Novack*, the court rejected the plaintiff's argument that the County was liable under § 1983 because it failed to adequately train its personnel to handle mentally ill inmates, noting that "a single instance of allegedly unconstitutional conduct does not demonstrate a municipality's deliberate indifference to the constitutional rights of its inhabitants." *Novack*, 226 F.3d at 530-532.

Appendix B

IT IS THEREFORE ORDERED THAT:

(1) The County Defendants entered into a settlement agreement with Plaintiff. On July 18, 2001, this court entered an Order (#99) finding that the settlement agreement was done in good faith and dismissing the County Defendants from the action, with prejudice. Accordingly, the County Defendants' Motion to Dismiss (#81) and Plaintiff's Motion to Strike the Motion to Dismiss (#82) are now MOOT. Accordingly, both Motions (#81, #82) are denied as MOOT.

(2) The Motion for Summary Judgment (#87) filed by Defendant Strzesak is GRANTED. Judgment is entered in favor of Defendant Strzesak and against Plaintiff.

(3) The Motion for Summary Judgment (#89) filed by Defendant Shepard is DENIED.

(4) The Motion for Summary Judgment (#91) filed by Defendant Daniels is GRANTED. Judgment is entered in favor of Defendant Daniels and against Plaintiff.

(5) The Motion for Summary Judgment (#93) filed by Defendant City of Champaign is GRANTED in part and DENIED in part. Judgment is entered in favor of Defendant City of Champaign and against Plaintiff on Count VIII of Plaintiff's Second Amended Complaint, based upon failure to train. Summary Judgment is DENIED as to Count VII of Plaintiff's Second Amended Complaint, based upon respondeat superior.

(6) The Motion to Dismiss (#95) filed by Defendants Miholic, Griffith, Myers, Kelly, Yohnka, Wachala, Friedlein, Gnagey, Frost, Bunyard and Nearing is GRANTED. This court concludes that Plaintiff has not established that this dismissal should be without prejudice. Accordingly, Defendants Miholic, Griffith, Myers, Kelly, Yohnka, Wachala, Friedlein, Gnagey, Frost, Bunyard and Nearing are dismissed from this action with prejudice.

(7) Plaintiff's Motion to Bar Expert (#101), Motion to Strike (#105) and Motion for Default Judgment (#106) are DENIED.

(8) The only Defendants remaining in this case are Shepard and the City of Champaign. This case remains set for a final pretrial conference on Monday, October 15, 2001, at 4:30 p.m., and remains set for a jury trial on Monday, October 22, 2001, at 9:30 a.m.

ENTERED this 15th day of October, 2001.

s/ Michael P. McCuskey
MICHAEL P. McCUSKEY
U.S. DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED MARCH 20, 2003

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

March 20, 2003

Before

Hon. RICHARD A. POSNER, *Circuit Judge*
Hon. DANIEL A. MANION, *Circuit Judge*
Hon. DIANE P. WOOD, *Circuit Judge*

No. 01-3745

JOANN CAVALIERI, as plenary guardian of the Estate of STEVEN CAVALIERI, a disabled person,

Plaintiff-Appellee,

v.

DONALD SHEPARD,

Defendant-Appellant.

Appeal from the United States District Court for the Central of Illinois.

No. 99-CV-2121

Appendix C

Michael P. McCuskey, *Judge.*

ORDER

On consideration of the petition for rehearing and rehearing *en banc* filed by counsel for the Defendant-Appellant, Donald Shepard on March 10, 2003, all members of the original panel have voted to **DENY** the petition for rehearing. No judge in regular active service requested a vote on the petition for rehearing *en banc.*

Accordingly, the petition for rehearing is hereby **DENIED.**

Supreme Court, U.S.
FILED
OCT 9 - 2003
OFFICE OF THE CLERK

No. 02-1843

IN THE

Supreme Court of the United States

DONALD SHEPARD,

Petitioner,

v.

JOANN CAVALIERI, as plenary guardian of the Estate of STEVEN CAVALIERI, a disabled person,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
Counter-Statement of the Case	1
Reasons for Denying the Petition	3
I. The Decision Below Does Not Present A Conflict.	3
II. The Decision Below Was Correct.	11
Conclusion	13

TABLE OF CITED AUTHORITIES

Page

Cases:

Anderson v. Creighton, 483 U.S. 635 (1987) 3

Anderson v. Romero, 72 F.3d 518 (7th Cir. 1995) .. 4

Buckley v. Rogerson, 133 F.3d 1125 (8th Cir. 1998) 4

Burgess v. Lowery, 201 F.3d 942 (7th Cir. 2000) .. 5, 6

Collignon v. Milwaukee County, 163 F.3d 982 (7th Cir. 1998) 8, 9, 10

Davis v. Scherer, 468 U.S. 183 (1984) 3

DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189 (1989) 1

Egebergh v. Nicholson, 272 F.3d 925 (7th Cir. 2001) 8, 9

Estate of Cole v. Fromm, 94 F.3d 254 (7th Cir. 1996) 12

Estate of Novack v. County of Wood, 226 F.3d 525 (7th Cir. 2000) 10, 11

Farmer v. Brennan, 511 U.S. 825 (1994) 1, 12

Fruit v. Norris, 905 F.2d 1147 (8th Cir. 1990) 7

Cited Authorities

	Page
Grendell v. Gillway, 974 F. Supp. 46 (D. Me. 1997)	7
Hall v. Ryan, 957 F.2d 402 (7th Cir. 1992)	3
Hope v. Pelzer, 536 U.S. 730 (2002)	3, 12
Malley v. Briggs, 475 U.S. 335 (1986)	3
Mitchell v. Forsyth, 472 U.S. 511 (1985)	3
Ramirez v. City of Chicago, 82 F. Supp. 2d 836 (N.D. Ill. 1999)	1, 7, 8, 11
Reddick v. Bloomingdale Police Officers, No. 96 C 1109, 2001 U.S. Dist. LEXIS 9619 (N.D. Ill. July 11, 2001)	1
Saucier v. Katz, 533 U.S. 194 (2001)	3, 12
Salazar v. City of Chicago, 940 F.2d 233 (7th Cir. 1991)	7
Vaughn v. Ruoff, 253 F.3d 1124 (8th Cir. 2001)	4, 5
Viero v. Bufano, 901 F. Supp. 1387 (N.D. Ill. 1995)	4

Cited Authorities

Page

Statute:

42 U.S.C. § 1983 ..... *passim*

Rules:

U.S. Supreme Court Rule 10 12

U.S. Supreme Court Rule 10(a) 12

U.S. Supreme Court Rule 10(b) 12

U.S. Supreme Court Rule 10(c) 12

COUNTER-STATEMENT OF THE CASE

Donald Shepard's Petition for a Writ of Certiorari is based on a single premise: that a city police officer's duties under 42 U.S.C. § 1983 terminate immediately when an arrestee is transferred to a county jail for holding. Shepard extends this premise to two scenarios: not only does he argue that Section 1983 liability ceases when a detainee moves from one state agency to another (Pet. pp. 2, 7, and 12 n.2); Shepard also argues that an *individual* officer must have the detainee in *his or her* actual custody in order for a duty to continue (Pet. pp. 2, 9, and 11). Shepard's position is that a state actor cannot be held liable under Section 1983 for anything he may do or fail to do after an arrestee is transferred, even if the state actor is aware of the transferee's substantial risk of suicide, need for medical attention, or other risk to the well-being of the transferee or those around him. This contention has been characterized by two federal courts as "an argument of breathtaking cynicism." *Ramirez v. City of Chicago*, 82 F. Supp. 2d 836, 839 (N.D. Ill. 1999); *Reddick v. Bloomingdale Police Officers*, No. 96 C 1109, 2001 U.S. Dist. LEXIS 9619, at *31 (N.D. Ill. July 11, 2001).

The dispute lies within the boundaries of two polar positions acknowledged by the parties. Shepard does not quarrel with the established law that a custodial officer has a duty to act in a way that is not deliberately indifferent to the risk perceived. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994); Pet. at 13. Cavalieri does not here challenge the established law that a state actor is not liable for injuries suffered by a plaintiff who is not in any form of state custody at the time of injury. *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 201 (1989). Cavalieri's contention, upheld by both the Seventh Circuit Court of Appeals and the

United States District Court for the Central District of Illinois, is that state custody means state custody. Shepard's position is that the words "custody" and "custodial officer" should be construed more restrictively, even in the absence of any authority for such a restrictive reading.

The parties also disagree on the nature of the Seventh Circuit's holding. In Shepard's understanding, the Seventh Circuit has "created[] a new class of duties which law enforcement officers now owe to persons held in custody by another agency." Pet. at 7. In Crawford's submission, the Seventh Circuit in *Crawford v. Shepard*, 321 F.3d 670 (7th Cir. 2003), has simply restated and applied existing law. Shepard maintains that the alleged absence of specific precedent governing his particular facts constitutes a lacuna in the established law. In contrast, Crawford submits that (1) there was and is established law concerning the scope and responsibilities of a suicidal arrestee in state custody, and (2) if that established law is to be changed, the proponent of change carries the burden to justify the change in the form of all relevant sources of guidance in the law. This is where Shepard has not met, accordingly, Crawford opposes Shepard's Petition for a Writ of Certiorari.

REASONS FOR DENYING THE PETITION

I. THE DECISION BELOW DOES NOT PRESENT A CONFLICT.

The petition asserts that "[i]n no case . . . petitioner has found, in no case cited by the plaintiff here, and in no case cited by the district court or the appellate court below, has a person in custody been found to hold [a Section 1983] right against an officer who does not have custody of him." Pet. at 9. This statement is incorrect.

A state actor has qualified immunity from suit if the claimed constitutional right at issue was not "clearly established" at the time the events occurred. *Saucier v. Katz*, 533 U.S. 194, 200 (2001). To be clearly established, the "contours of the right must be sufficiently clear that a reasonable officer would understand that what he is doing violates the right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). This Court has recognized that there need not be a case that has specifically held that the very act in question is unlawful; all that the law must be clear enough that an officer has fair notice that his actions are unlawful. *Mitchell v. Forsyth*, 472 U.S. 511, 535 n.12 (1985); *Malley v. Briggs*, 475 U.S. 335, 344-45 (1986); *Davis v. Scherer*, 468 U.S. 183, 191 n.8 (1984); *Hope v. Pelzer*, 536 U.S. 730, 739-40 (2002). The appellate court below identified the right in question as "the right to be free from deliberate indifference to suicide." *Cavalieri*, 321 F.3d at 623 (7th Cir. 2003), Pet. App. A at 11a. That right was clearly established prior to Steven Cavalieri's 1998 suicide attempt. *See Hall v. Ryan*, 957 F.2d 402, 406 (7th Cir. 1992).

Nevertheless, Shepard in his petition challenges the appellate court for citing "no prior cases which held that an

officer owes a duty to a prisoner or a detainee *who is not in his custody* to keep the custodial agency advised of information the officer learned about the prisoner after custody was transferred." Pet. at 11 (emphasis added). Even this is incorrect. In *Vero v. Bufano*, 901 F. Supp. 1387, 1394 (N.D. Ill. 1995), cited with approval by the Seventh Circuit in *Saucedo*, 324 F.3d at 933, Pet. App. A at 12a, the plaintiff's decedent committed suicide while in the custody of an Illinois correctional facility. An Illinois court probation officer had allegedly failed to communicate information as to the inmate's mental health to the correctional facility. *Vero*, 901 F. Supp. at 1388. Despite the probation officer's lack of custody over the inmate, she was not entitled to qualified immunity from suit. *Id.* There were genuine issues of material fact whether the probation officer had been deliberately indifferent to the strong likelihood that the inmate would commit suicide. *Id.*

Although district court decisions such as *Vero* have "no weight as precedent," *Anderson v. Romero*, 72 F.3d 518, 525 (7th Cir. 1995), "a court should look to all available decisional law, including decisions of state courts, other circuits and district courts" in determining whether a right is clearly established. *Buckley v. Haggerson*, 122 F.3d 1112, 1120 (8th Cir. 1997); *see also Vaughn v. Ruoff*, 253 F.3d 1256, 1260 (10th Cir. 2001) (in determining whether a right is clearly established, "we look to all available decisional law, including decisions from other courts, federal and state, when there is no binding precedent in this circuit"). Further, even if there were no cases with facts similar to those in the instant case, "[a] constitutional right that is so patent that no violator had even attempted to obtain an appellate ruling on it can be regarded as clearly established even in the absence of precedent." *Anderson*, 72 F.3d at 526-27.

The Seventh Circuit and the Eighth Circuit are in agreement, without demur from any other circuit, that even in the "complete absence of any decisions involving similar facts, a right can be clearly established if a reasonable public official would have known her conduct was unconstitutional." *Vaughn*, 253 F.3d at 1130; *Burgess v. Lowery*, 201 F.3d 942, 944-45 (7th Cir. 2000). In *Burgess*, the Seventh Circuit observed:

> [T]he absence of a decision by the Supreme Court or this court cannot be conclusive on the issue whether a right is clearly established in this circuit. There might be no decision in other court simply because the existence of the right was so clear, as a matter of the wording of a constitutional or statutory provision or decisions in other circuits or in state courts, that no one thought it worthwhile to litigate the issue. Citations omitted. To rule that until the Supreme Court has spoken no right of litigants in this circuit can be deemed established unless we have decided the same would discourage anyone from being the first to bring a damages suit in this court; he would be certain to be unable to obtain any damages.

Id. at 945 (emphasis in original). At issue in *Burgess* was the practice of strip searches of prison visitors. The test for "clearly established," according to the Seventh Circuit,

> ought to be whether a reasonable official in the position of [the particular defendant(s)], considering all relevant sources of guidance to the law, might have thought it reasonably possible that this court or eventually the U.S. Supreme Court would hold that strip searches of prison visitors are proper even without reasonable suspicion.

Id. at 946. The same logic applies to Shepard in the instant case, with particular application to his suggestion that he has a safe harbor once custody is transferred to another state actor. In fact, the Seventh Circuit in *Burgess* went so far as to say that even contrary decisions by other federal appellate courts or state courts would not necessarily provide a defendant state actor with a "safe harbor." *Id.* The reasonableness of a state actor's conduct is determined in light of the particular facts of the case and the state of the law from "all relevant sources." *Id.*

The defendants in *Burgess*, like the petitioner in the matter *sub judice*, argued that "because the doctrine [at issue] was not mentioned in the previous cases on which the plaintiffs rely to show that the right sought to be enforced in this case is well established, those cases are not authority for the plaintiffs' position." *Id. See* Pet. at 9 ("[i]n no case . . . petitioner has found, in no case cited by the plaintiff here, and in no case cited by the district court or the appellate court below, has a person in custody been found to hold such a right against an officer who does not have custody of him"). The Seventh Circuit in *Burgess* made short work of that argument:

> [Defendants] are clearly wrong, though we can find no case on the question, because it would mean that any time a state official could think of an argument for some position that had not been mentioned in a previous decision the contrary of that position could not be considered established in law. Decisions would have no authority if their writ ran only to the arguments explicitly discussed in them.

Id.

Among the "relevant sources of guidance" to whether the law is clearly established is common sense. *Fruit v. Norris*, 905 F.2d 1147, 1150-51 (8th Cir. 1990) (holding that "common sense" suggested that prison officials should know that unprotected contact with human waste would cause disease). "Simply because there is no clearly defined case law condemning certain conduct does not mean police officers should be free to engage in such conduct, no matter how offensive or destructive to a fair and just society that conduct may be, and then hide behind the shield of qualified immunity." *Grendell v. Gillway*, 974 F. Supp. 46, 52 (D. Me. 1997).

In *Ramirez*, 82 F. Supp. 2d at 839, fire department paramedics argued that they had no responsibility under Section 1983 to provide an arrestee with medical care, because he was in police custody at the time. The court, relying on *Salazar v. City of Chicago*, 940 F.2d 233 (7th Cir. 1991), held that "if [the plaintiff] was in custody from the time the paramedics arrived – that is, if he was not free to seek other forms of assistance – then the paramedics might be liable for violating [his] right to due process by failing to treat his injuries." *Id.*, quoting *Salazar*, 940 F.2d at 237.

> The Seventh Circuit [in *Salazar*] expressly did not limit the liability of the paramedics to cases where persons were in *their* custody, but extended it to include persons who [were] in the custody of police *when the paramedics arrived*. . . . Mr. Ramirez, handcuffed and on his face, was certainly in custody and unable to seek other aid . . . [This] disposes of the contention that the plaintiffs' state law claim should be dismissed because he was not in their custody. It doesn't matter as long as he was in state custody.

Ramirez, 82 F. Supp. at 840 (emphasis in the original).

In *Salazar*, the paramedics argued expressly that the pretrial detainee "was not in their custody." *Salazar*, 940 F.2d at 237. The Seventh Circuit contrasted "custody" with "freedom to leave," regardless of which state agency had custody, observing that "it may be that . . . the paramedics knew that Salazar was not free to leave." *Id.* The parties in *Salazar* agreed that *Salazar* should be treated as a pretrial detainee. *Id.* The fact that *Salazar* was in police custody, not the paramedics' custody, did not offer the paramedics a safe haven; rather, their case went to the jury. *Id.* at 241.

The court in *Ramirez* described the paramedics' argument that they had no duty under Section 1983 to treat a man who was not in their specific custody as "an argument of breathtaking cynicism." *Id.* at 839. As the Seventh Circuit recognized in *Cavalieri*, "[t]he fact that several state agencies were working together on [Steven Cavalieri's] case, and that Steven happened to attempt suicide in the county's facility rather than at the police station, does not change [the court's] analysis." *Cavalieri*, 321 F.3d at 623-24, Pet. App. A at 13a. This general observation has even more force under the facts of the instant case, where Cavalieri remained under city police investigation while he was temporarily held in the county jail, and where Shepard himself continued to investigate the incident that gave rise to Cavalieri's arrest. Pet. App. A at 4a.

The appellate court below also relied upon *Egebergh v. Nicholson*, 272 F.3d 925 (7th Cir. 2001), and *Collignon v. Milwaukee County*, 163 F.3d 982 (7th Cir. 1998). *Egebergh* was a Section 1983 action against two police officers arising from the death of an arrestee in a Cook County jail. The record established that the police officers knew the arrestee was an insulin-dependent diabetic who required regular insulin injections. *Egebergh*, 272 F.3d at 928. Not only did the police

officers fail to administer an insulin shot, they also failed to inform the county jail about the arrestee's need for insulin injections. *Id.* The court in *Egebergh* held that these facts defeated defendants' motion for qualified immunity. *Id.* The fact that the death of the arrestee occurred while he was in county custody rather than police custody was irrelevant.

In *Collignon*, the Seventh Circuit found that Milwaukee County was not responsible for the suicide of an arrestee who killed himself after being released to his parents. In his petition, Shepard urges that *Collignon* supports his "no custody, no foul" argument. Pet. at 13. But as the Seventh Circuit recognized in *Cavalieri*, *Collignon* is clearly distinguishable because at the time of his suicide the arrestee was no longer in state custody at all, whereas Steven Cavalieri was. *Cavalieri*, 321 F.3d at 623, Pet. App. A at 11a-12a. Moreover, as the Seventh Circuit noted in *Cavalieri*, even under the facts of *Collignon*, where there was no state custody at the time of the suicide, the case may have been decided differently if the county jail's psychiatrist had known that the arrestee "was on the verge of committing suicide." *Collignon*, 163 F.3d at 990; *Cavalieri*, 321 F.3d at 623, Pet. App. A at 12a.

In *Cavalieri*, the Seventh Circuit stated that "[n]othing in *Collignon* implies that the court was establishing a general rule of non-liability for transferees":

> In fact, Shepard's argument implies that he did not have to pass along *any* information to his colleagues at the county jail. No responsible person in Shepard's position would have taken such a position. If Steven had been armed, Shepard could not have stayed silent and waited to see if

> the CCCF officials found a weapon; if Steven was prone to violent outbursts, Shepard similarly could not have left his colleagues and the other detainees at Steven's mercy. While there are different arms of state government, the walls between them are not as high as Shepard implies. To the contrary, each must keep the other informed about material facts, including suicide risks. [Citations omitted.] Even the *Collignon* court conceded that it would have been facing a different problem if the officials had known that the detainee was a likely suicide risk.

Cavalieri, 321 F.3d at 623, Pet. App. at 12a (emphasis in original).

Thus, although defendant correctly states that, under *Collignon*, "the constitutional duty to provide health care flows directly from the fact of custody," Pet. at 12, that observation does not support defendant's advocacy of a new limitation, that the relevant custody must be continuously exercised by defendant himself.

The appellate court below also cited *Estate of Novack v. County of Wood*, 226 F.3d 525 (7th Cir. 2000). In *Novack*, an arrestee was a schizophrenic and possible suicide risk. He was taken into custody by the city police department, then transferred from the city police station to the county jail. *Id.* at 527. Although the Seventh Circuit found that the county could not be held liable under Section 1983 because "deliberate indifference" by its personnel could not be established, the opinion is noteworthy for the exchange of information between the city police and the county jail.

Unlike Shepard in the instant case, the police officer, Deputy Starks, "informed [the county officer] that Novack was a suicide risk and that [county] staff should watch him accordingly." *Id.* at 528. Police Officer Starks' conduct in *Novack* is precisely the proper standard for Shepard's duty in the instant case: communicating information about a substantial suicide risk while an arrestee remains in state custody, unable to attend to his own needs.

At a minimum, a genuine issue of material fact exists as to Shepard's deliberate indifference, because he took no action to inform the county jail of Steven's substantial risk of suicide. Another factual issue at trial will be Shepard's awareness of Steven's substantial risk of suicide. *Cavalieri*, 321 F.3d at 620-21, Pet. App. A at 7a-8a. The transfer of custody from city to county, or from Shepard to another individual officer, did not toll the bell on Shepard's responsibility or potential liability. *Id.* at 623-24, Pet. App. A at 13a. Such an argument, in the words of *Ramirez* quoted above, is one of "breathtaking cynicism."

II. THE DECISION BELOW WAS CORRECT.

The Seventh Circuit's holding was simply that, taking the facts in the light most favorable to Cavalieri, a trier of fact could find that Shepard was deliberately indifferent to Cavalieri's suicide risk, and thus liable under 42 U.S.C. § 1983 as a consequence of Cavalieri's suicide attempt. *Cavalieri*, 321 F.3d at 620, Pet. App. A at 13a. Accordingly, summary judgment in Shepard's favor was inappropriate. At trial, the jury may find that Shepard was aware of Cavalieri's substantial risk of suicide, and that he was deliberately indifferent. Alternatively, the jury

may find that Shepard was negligent, but that he did not act with deliberate disregard.[1]

Review on a writ of certiorari is not a matter of right, and a petition for a writ of certiorari will be granted only for compelling reasons. S. Ct. Rule 10. Petitioner has cited no disagreement among federal or state courts regarding liability for transferees. S. Ct. Rule 10(a), 10(b). As discussed above, there is no conflict between the Seventh Circuit's decision and the decisions of this Court in *Hope*, *Saucier*, *Farmer*, or any other case. S. Ct. Rule 10(c). Nor does petitioner provide any instance of departure by the Seventh Circuit from the accepted and usual course of judicial proceedings. S. Ct. Rule 10(b).

There is no suggestion that the Seventh Circuit sanctioned such a departure by the trial court. S. Ct. Rule 10(a). The record before the trial court established "a factual dispute [that cannot] be resolved at the summary judgment stage." Pet. App. B at 44a-45a. Based on this record, the Seventh Circuit held that summary judgment was inappropriate, and affirmed the judgment of the district court. *Cavalieri*, 321 F.3d at 623, Pet. App. A at 13a.

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1. In his dissenting opinion, Circuit Judge Manion agreed with the majority that "on the date of Cavalieri's nearly successful suicide attempt it was clearly established that a police officer could not act with deliberate indifference toward a pretrial detainee who the officer believed was a suicide risk," citing *Estate of Cole v. Fromm*, 94 F.3d 254, 258 (7th Cir. 1996). Pet. App. A at 21a. However, Judge Manion disagreed with the court's conclusion that the facts most favorable to the plaintiff were sufficient to allow a jury to conclude that Shepard acted with deliberate indifference or with reckless disregard for Cavalieri's safety. Pet. App. A at 14a. In Judge Manion's view, Shepard's failure to notify the jail may have been negligent, but not deliberately indifferent. Pet. App. A at 14a-15a, 19a. His Honor's criticism was that the majority had "equated deliberate indifference with negligence." Pet. App. A at 15a, 19a, 21a.

The proper destination for this case is not the Supreme Court of the United States, but the United States District Court for the Central District of Illinois, for resolution of the factual dispute by the trier of fact. There is no basis for certiorari.

CONCLUSION

For all the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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